No. 04-593

Title:	Domino's Pizza, Inc., et al., Petitioners v. John McDonald
Docketed:	November 3, 2004
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(02-16900)
Decision Date:	June 18, 2004
Rehearing Denied:	August 2, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 1 2004	Petition for a writ of certiorari filed. (Response due December 3, 2004)
Dec 9 2004	Order extending time to file response to petition to and including January 3, 2005.
Jan 18 2005	DISTRIBUTED for Conference of February 18, 2005.
Feb 8 2005	Response Requested . (Due March 10, 2005)
Mar 10 2005	Brief of respondent John McDonald in opposition filed.
Mar 23 2005	DISTRIBUTED for Conference of April 15, 2005.
Apr 18 2005	DISTRIBUTED for Conference of April 22, 2005.
Apr 25 2005	Petition GRANTED.
May 31 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 30, 2005.
Jun 2 2005	Further extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 14, 2005.
Jun 20 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 14 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Jul 14 2005	Joint appendix filed.
Jul 14 2005	Brief of petitioner Domino's Pizza, LLC, et al. filed.
Jul 14 2005	Brief of amicus curiae of Pacific Legal Foundation filed.
Jul 14 2005	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Jul 14 2005	Brief amici curiae of Alabama, et al. filed.
Jul 25 2005	SET FOR ARGUMENT on December 6, 2005.
Aug 5 2005	CIRCULATED.
Aug 8 2005	Extension of time within which to file respondent's brief on the merits to and including September 22, 2005.
Sep 22 2005	Brief of respondent John McDonald filed. (Distributed)

Sep 22 2005	Brief amici curiae of New York, et al. filed. (Distributed)
Sep 22 2005	Brief amici curiae of Lawyers Committee for Civil Rigths Under Law, et al. filed. (Distributed)
Oct 27 2005	Reply of petitioners Domino's Pizza LLC, et al. filed. (Distributed)
Oct 28 2005	Record received from U.S.C.A. - 9th Circuit. (1 envelope)
Nov 15 2005	Record received from U.S.D.C. District of Nevada. (1 envelope)
Dec 6 2005	Argued. For petitioners: Maũreen E. Mahoney, Washington, D.C. For respondent: Allen Lichtenstein, Las Vegas, Nev.

Supreme Court, U.S.
FILED
NOV 1 2004
OFFICE OF THE

No. 04 593

In The

Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL F. POLSENBERG
Counsel of Record
BEAU STERLING
HEIDI PARRY STERN
BECKLEY SINGLETON CHTD.
530 Las Vegas Boulevard, Third Floor
Las Vegas, Nevada 89101
(702) 385-3373

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

LIST OF PARTIES

The parties to the proceedings are identified in the caption of the case. In accordance with S. Ct. R. 29.6, petitioners Domino's, Inc. and Domino's Pizza LLC state that Domino's, Inc. owns 100 percent of the membership interest in Domino's Pizza LLC. Since July 2004, the stock of Domino's, Inc. has been publicly traded on the New York Stock Exchange under the ticker symbol "DPZ."

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS PETITION	6
I. The Ninth Circuit's Ruling That Standing Under Section 1981 Does Not Require a Contractual Relationship Creates a Circuit Split Without Providing an Explanation for the Alternative Ruling	7
II. The Thorough and Thoughtful Reasoning of Other Circuit Courts Illustrates That Standing Under Section 1981 Requires a Contractual Relationship	10
A. The Plain Language of Section 1981 Limits Its Standing to Those Plaintiffs Who Are Parties to the Contract at Issue	10
B. Standing Requirements Under Section 1981 Are Unaffected by a Plaintiff's Status as President/Sole Shareholder of the Contracting Company	13
C. The Existence of Individual Injuries Alone Has No Effect on the Standing Requirements of Section 1981	15
III. This Case Presents an Issue of Great National Importance and Deserves to be Reviewed Now Rather Than Later	16
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Carrion v. Yeshiva Univ., 535 F.2d 722 (2nd Cir. 1976) 9

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999) 13, 14

Elk Grove Unified Sch. Dist. v. Newdow, ___ U.S. ___, 124 S. Ct. 2301 (2004) 6

Gomez v. Alexian Bros. Hosp., 698 F.2d 1019 (9th Cir. 1983) ..... *passim*

Guides Ltd. v. Yarmouth Group Prop. Mgmt., Inc., 295 F.3d 1065 (10th Cir. 2002) 15

Kyles v. J.K. Guardian Sec. Serv., Inc., 222 F.3d 289 (7th Cir. 2000) 10, 11, 12

London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981) 9

Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990) 13, 14

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

42 U.S.C. § 2000e-2(a) 8, 11

42 U.S.C. § 1981 ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Enacted as part of the Civil Rights Act of 1866, 42 U.S.C. § 1981 protects the ability "to make and enforce contracts" free from racial discrimination. By its plain terms § 1981 encompasses claims of discrimination by a party to a contract, but it does not provide an individual cause of action for nonparties who are incidentally affected by the alleged discrimination. With the exception of the Ninth Circuit, every United States Court of Appeals to consider this issue has come to the same conclusion: a nonparty to a contract lacks standing to bring a suit for discrimination under § 1981. In its decision below, the Ninth Circuit has broken rank with its sister circuits, holding that a nonparty to a contract has standing to bring suit under § 1981 if he or she alleges "separate and distinct" injuries arising out of the discriminatory behavior.

The result of the Ninth Circuit's decision in this case is an unwarranted expansion of liability for defendants under § 1981 as well as the destruction of national uniformity in the interpretation and application of the Civil Rights Act. Review by this Court is necessary now rather than later to address the negative public policy implications of the Ninth Circuit's interpretation of § 1981 and to correct the Ninth Circuit's erroneous statement of the law.

OPINIONS BELOW

The unpublished memorandum of the United States Court of Appeals for the Ninth Circuit was issued on June 18, 2004. (App. 1-2.) The Ninth Circuit's unpublished order denying rehearing and rehearing en banc was issued on August 2, 2004. (App. 8.) The unpublished order of the

district court granting Domino's motion to dismiss was issued on August 23, 2002. (App. 3-7.)

JURISDICTIONAL STATEMENT

Jurisdiction lay in the district court pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Ninth Circuit entered a memorandum reversing the district court's decision and remanding the case to the district court on June 18, 2004. The Ninth Circuit entered an order denying rehearing and rehearing en banc on August 2, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Equal Rights Under the Law

Section 1 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991 (42 U.S.C. § 1981)

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

The Contract Between JWM Investments, Inc. and Domino's

This case arises out of the contractual relationship between Petitioners Domino's Pizza LLC and Domino's Pizza, Inc. (collectively, "Domino's") and non-party JWM Investments, Inc. ("JWM"), a Nevada corporation. (App. 11.)[1] Domino's entered into four contracts with JWM for the construction of four restaurants in Las Vegas, Nevada. (*Id.*) The Domino's contracts were with JWM, not with Respondent John McDonald. (*Id.*; *see also* App. 14.) While McDonald is the president and sole shareholder of JWM (App. 11), he personally never sought, entered into, or was bound by any contract with Domino's. (App. 11, 14.)

[1] A copy of the verified complaint is included in the attached appendix at 9-19.

The Relationship Between Domino's and JWM Deteriorates

After delays in the second construction project, the relationship between JWM and Domino's "soured." (App. 12.) Domino's sought JWM's consent to voluntarily cancel the contracts for the remaining projects, but JWM refused. (App. 12.) Nevertheless, Domino's eventually terminated its contracts with JWM. (App. 13.) Although Domino's strenuously denies the allegation, McDonald alleges that Domino's terminated its contrac. with JWM because McDonald is African-American.[2] (App. 13, 16.)

McDonald Files Suit Against Domino's, Claiming Various Personal Injuries

McDonald sued Domino's and petitioner Debbie Pear on his own behalf, pursuant to 42 U.S.C. § 1981. (App. 9.) McDonald's complaint alleges that he suffered, *inter alia*, financial loss, emotional distress, mental anguish, and humiliation – all caused by Domino's termination of its contracts with JWM. (App. 16-17.)

[2] The only tangible basis of this allegation deserves passing note. Allegedly Debbie Pear, Domino's real estate negotiator, in expressing frustration at JWM's delays, commented to McDonald that she did not like dealing with "you people." (App. 12-13.) While those expecting racial bigotry might see this as proof of their assumption, the comment also has common race-free applications where the company with which one is dealing experiences persistent delays and raises numerous excuses.

The District Court Dismisses McDonald's Claims For Lack of Standing

Domino's moved to dismiss McDonald's complaint on the ground that, not being a party to the contracts at issue, McDonald lacked standing under 42 U.S.C. § 1981. (App. 3.) The district court agreed and granted the motion. (*Id.*) McDonald appealed this ruling to the Ninth Circuit.

The Ninth Circuit Court of Appeals Reverses and Remands

On appeal, a three-judge panel of the Ninth Circuit reversed and remanded the case back to the district court. (App. 1-2.) The court concluded that "[t]hough our sister circuits may reach a contrary result . . . ," it was bound by its decision in *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019 (9th Cir. 1983). (App. 2.) Thus relying on *Gomez*, the Ninth Circuit held:

> While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc.

(App. 2.)

Domino's Requests for Rehearing and Rehearing en Banc Were Denied With One Dissent

On August 2, 2004, the Ninth Circuit panel denied Domino's petition for rehearing and petition for rehearing en banc. (App. 8.) One member of the panel, Judge

Diarmuid F. O'Scannlain, voted to grant the petition for rehearing en banc. (*Id.*)

REASONS FOR GRANTING THIS PETITION

No less than four United States Courts of Appeals have reached the conclusion that the lack of a contractual relationship with the defendant takes a plaintiff's claims out of the zone of interests protected by 42 U.S.C. § 1981 and therefore destroys standing.[3] These courts agree that the plain language of § 1981, which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," specifically protects the right to contract. Thus, a plaintiff does not have a cause of action under § 1981 where the plaintiff has neither a contractual relationship (or intended contractual relationship) with the defendant, nor has suffered interference with its contractual relationship (or intended contractual relationship) with a third party.

Without the benefit of reasoned analysis, the Ninth Circuit has adopted the position that standing under § 1981 is "coextensive" with standing under Title VII, thus expanding liability for defendants sued under § 1981 far beyond the scope contemplated by the statute's plain language. The only limit the Ninth Circuit's ruling places on a plaintiff's standing under § 1981 is that a plaintiff "seek[] recovery for individual injuries separate and

[3] It is a basic tenet of law that "prudential standing encompasses . . . the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S. Ct. 2301, 2309 (2004) (citation and internal quotation marks omitted).

distinct from contract damages," (App. 2), an inquiry that is wholly irrelevant to the determination of standing. The Ninth Circuit's careless decision raises the specter of liability run amok and has potentially broad policy implications for businesses attempting to contract under the precarious conditions created by its ruling. This Court should grant Domino's petition in order to resolve this conflict among the circuits and to clarify the scope of protection afforded by § 1981.

I. The Ninth Circuit's Ruling That Standing Under Section 1981 Does Not Require a Contractual Relationship Creates a Circuit Split Without Providing an Explanation for the Alternative Ruling

In this case, the Ninth Circuit relied entirely on *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019 (9th Cir. 1983) in holding that standing under § 1981 does not require a contractual relationship. Unfortunately, *Gomez* did not address in any meaningful way the extent of standing under § 1981. Despite this shaky foundation, the Ninth Circuit held that McDonald had standing to bring his § 1981 cause of action against Domino's even though he acknowledged that he was not a party to Domino's contract with JWM Investments. The rule underlying the Ninth Circuit's decision in this case, taken from *Gomez*, is that a plaintiff need prove only an injury-in-fact, "separate and distinct" from contract damages, in order to establish standing under § 1981. In particular, the court of appeals held in this case:

> While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries

> separate and distinct from contract damages suffered by JWM Investments, Inc.

(App. 2.)

In *Gomez*, the Ninth Circuit held that a physician of Hispanic origin who practiced medicine as an employee of a professional corporation had standing to sue under § 1981 when the defendant hospital rejected, for allegedly racial reasons, the corporation's contract proposal to operate the hospital's emergency room. *Gomez*, 698 F.2d at 1021-22. The physician had alleged injuries distinct from that of the corporation, including loss of employment as director of the defendant's emergency room, as well as "humiliation and embarrassment." *Id.* at 1021.

Gomez's fundamental weakness as binding precedent is its failure to analyze the specific requirements for standing pursuant to the plain language of § 1981. This is not surprising, as *Gomez* is first and foremost a Title VII[4] case. In fact, all but two sentences of the legal discussion in *Gomez* are devoted to addressing the hospital's contention that the doctor "lack[ed] standing under Title VII because an independent contractor relationship was contemplated between [the hospital] and [the professional corporation] and Tile VII was intended to protect only employment relationships." *Id.* at 1021. The *Gomez* court concluded that the doctor was entitled to have his Title VII claim tried on the merits, reasoning that Title VII extends standing even to individuals who do not stand in a direct

[4] Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C. § 2000e-2(a).

employment relationship with an employer. *Id.* at 1021-22. Without any further discussion, the court then concluded:

> The same is true of plaintiff's claim under §§ 1981 and 1985(3). "The guarantees of § 1981 and Title VII against racial discrimination are coextensive. . . ." *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981).

Id. at 1022. However, both *London v. Coopers & Lybrand*, 644 F.2d 811 (9th Cir. 1981) and *Carrion v. Yeshiva University*, 535 F.2d 722 (2nd Cir. 1976), the cases from which the language quoted in *Gomez* is derived, involved discriminatory interference with *employment contracts*. Obviously, where an employment contract is involved, Title VII (which concerns employment) and § 1981 (which concerns contracts) are "coextensive in scope."[5]

In *Gomez*, on the other hand, and even more obviously in this case, there is no employment contract and thus no basis for concluding that the broad standing requirement of Title VII – which extends standing to anyone who has suffered an injury in fact – also applies to § 1981. By

[5] In fact, once a plaintiff has shown the applicability of Title VII, any claim based on § 1981 is "superfluous," which explains why the *Gomez* court dealt so dismissively with the § 1981 standing issue. As the Second Circuit reasoned in *Carrion*:

> The claims of discrimination which we have already discussed are specifically within Subchapter VI of Title 42 s 2000e et seq. [Title VII], which deals exclusively with equal employment opportunities ***and therefore makes reference to ss 1981 and 1983 superfluous***. No greater or lesser protection against discriminatory practices is provided in the latter sections and we do not understand appellant to argue otherwise.

Carrion, 535 F.2d at 729 (emphasis added).

relying on and expanding the language of *Gomez* without further explanation, the Ninth Circuit continues to misapply the standing requirements of § 1981.

II. The Thorough and Thoughtful Reasoning of Other Circuit Courts Illustrates That Standing Under Section 1981 Requires a Contractual Relationship

Several circuits have more closely examined the § 1981 standing issue in the years after the Ninth Circuit's *Gomez* decision. These courts have all held that a person who is not a party to the contractual relationship, or intended contractual relationship, out of which the discrimination arises has no standing to bring a § 1981 cause of action – even if that party alleges some injury, pecuniary, emotional, or otherwise. Most of these courts recognize that "Section 1981 . . . protects the right to enter into and preserve a contractual relationship, period. . . . The class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship." *Kyles v. J.K. Guardian Sec. Serv., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000) (citations omitted).

A. The Plain Language of Section 1981 Limits Standing to Those Plaintiffs Who Are Parties to the Contract at Issue

The Seventh Circuit, in a well-reasoned opinion, has held that because the language of § 1981 protects the contractual relationship itself, the statute limits the class of person who may sue to persons in the contractual relationship. *See Kyles*, 222 F.3d at 303. Notably, the *Kyles* court engaged in the detailed comparison of Title VII and

§ 1981 that the Ninth Circuit neglected to perform in *Gomez*.

In *Kyles*, the Seventh Circuit considered whether "job testers" (people who apply for jobs with the sole intention of testing for discrimination, not of actually accepting a position) who alleged that they were discriminated against by prospective employers stated a claim under Title VII and under § 1981. The court's opinion extensively analyzes the differences in the standing requirements of these two civil rights statutes. In particular, the court compared the broad scope of standing under VII, which Congress meant to extend to the outer boundaries laid down by Article III of the Constitution, with the narrow scope of standing under § 1981, which, by its terms, protects only the right to enter into and preserve a contractual relationship. As the court reasoned:

> When Congress made it unlawful for an employer "to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race. . . . ," 42 U.S.C. § 2000e-2(a)(2), it created a broad substantive right that extends far beyond the simple refusal or failure to hire. *Cf.* § 2000e-2(a)(1). . . . [A job applicant] therefore has standing to sue, even if she has not been harmed apart from the statutory violation. . . .
>
> * * *
>
> Section 1981, by contrast, does not proscribe any practice that might tend to interfere with one's ability to enter and enforce a contract; *it protects the right to enter into and preserve a contractual*

> *relationship, period*. Moreover, there is nothing in section 1981's language suggesting that Congress meant to stretch standing to the limits of Article III.

Kyles, 222 F.3d at 298, 303 (citations and footnote omitted) (emphasis added).

Recognizing these differences, the court held that the job testers, because they had been discriminated against by the employer, had standing under Title VII, but because they neither entered into nor sought any contractual relationship with the employer (and in fact were obligated to turn down any job offer they received), they did not have standing under § 1981. As the court concluded:

> The terms of 1981 are more narrow, however – it protects the contractual relationship itself. The class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship. . . . The discrimination may be altogether real, and the [plaintiff] may have suffered an identifiable injury; but the employer has not deprived the [plaintiff] of her right to make or enforce contracts. *The [plaintiff's] injury, if any, is one that lies outside the zone of interests that section 1981 protects.*

Id. at 303-04 (citations omitted) (emphasis added).

The underlying reasoning of *Kyles* is in direct conflict with this case and *Gomez*, which are based on the Ninth Circuit's conclusion in *Gomez* that "[t]he guarantees of § 1981 and Title VII against racial discrimination are coextensive," *Gomez*, 698 F.2d at 1021, and that standing under § 1981 does not require a contractual relationship so long as the plaintiff claims some separate and distinct

injury. The Seventh Circuit's reasoned opinion demonstrates the shortsightedness of the Ninth Circuit's conclusion that standing under § 1981 is "coextensive" with standing under Title VII.

B. Standing Requirements Under Section 1981 Are Unaffected by a Plaintiff's Status as President/Sole Shareholder of the Contracting Company

Standing under § 1981 in the context of business contracts also requires a contractual relationship with the defendant. In *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir. 1990), the president/sole shareholder of an energy resource firm sued various utility companies under § 1981 for refusing to enter into long-term natural gas supply contracts with the firm. The Fifth Circuit held that the plaintiff could not bring an individual § 1981 claim because the alleged discrimination could only be asserted to invade the legal rights of the corporation and not the rights of the plaintiff, the company's sole shareholder. *Id.* at 565. As the court reasoned:

> Searcy [the president], likewise, has no standing, individually, to assert claims against the defendants under section 1981. The discrimination alleged by Searcy can be asserted to invade the legal rights of [the corporation] only, since the corporation, and not its directors, officers, or shareholders, has any of the colorable rights that Searcy claims were violated by the defendants.

Searcy, 907 F.2d at 565.

In *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999), the First Circuit also rejected the contention

that a sole shareholder of a corporation has standing to bring a § 1981 claim for his injuries where it is the corporation and not the shareholder that entered into the contract with the defendant. In *Danco*, the corporate plaintiff and the company's sole minority shareholder brought an action against Wal-Mart alleging racial discrimination under § 1981. The district court entered judgment on a jury verdict in favor of the plaintiffs. The First Circuit concluded that the individual plaintiff, as an employee or shareholder, could not collect damages on his own behalf. *Id.* at 14. The court reasoned:

> Nevertheless, in the present case Danco [the corporation] has a potential claim under section 1981, but Guiliani [the sole shareholder of the corporation] does not. The same statutory language that gives a claim to Danco, as an independent contractor with Wal-Mart, precludes such a claim by Guiliani unless he also had a contract with Wal-Mart. It appears, not surprisingly, that the contract in question was between Wal-Mart and Danco. Nothing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely affiliated – as an owner or employee – with a contracting party that is discriminated against by the company that made the contract.

Id. at 14 (footnote omitted).

Like the individual plaintiffs in *Searcy* and *Danco*, McDonald asserted no independent legal claim or right of his own in this case. Instead, he asserted only individual injuries stemming from alleged discrimination that affected JWM's contract rights. The Ninth Circuit's failure, here and in *Gomez*, to consider the legal rights asserted by the plaintiffs rather than their injuries alone has resulted

in an erroneous precedent with potentially enormous negative consequences.

C. The Existence of Individual Injuries Alone Has No Effect on the Standing Requirements of Section 1981

The Tenth Circuit recently reached the same result as the First, Fifth and Seventh Circuits – that a plaintiff without a contract has no standing under § 1981. *Guides Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (10th Cir. 2002). In dismissing the claims of the president and shareholder of the contracting corporation, the Tenth Circuit squarely rejected her contention that she had standing "because, as sole shareholder of [the corporation] she suffered injury separate and distinct from that of [the corporation]." *Id.* at 1071. The court held that where an individual plaintiff is not a party to the contract at issue, that plaintiff's emotional distress claims are by necessity derivative of the § 1981 claim of the contracting corporation and are not truly separate and distinct. *See id* at 1072-73 ("Foote suffered no violation of her contract rights . . . that was any way different from the violations claimed by Africa House. Her claim is derivative of that of Africa House and she does not have standing to sue on her own behalf.").

In reaching its decision, the Tenth Circuit specifically and carefully considered the *rights* asserted by the individual plaintiff, not just her *injuries*. The court reversed the district court judgment in favor of plaintiff, noting that the party seeking to contract with the defendants and to lease the property, and thus the direct victim of the alleged discrimination, was plaintiff's company rather than plaintiff herself. *Id.* at 1072. The court's standing analysis

was unaffected by plaintiff's allegations of injury because, absent a contractual relationship, plaintiff did not even meet the threshold requirements for bringing a claim under § 1981.

III. This Case Presents an Issue of Great National Importance and Deserves to be Reviewed Now Rather Than Later

This Court should grant this petition in order to ensure that § 1981 is properly and uniformly applied throughout the nation. It is necessary that this case be heard now rather than later because the Ninth Circuit's decision threatens to open the floodgates in that circuit to discrimination claims under § 1981 with little regard for the plain language of the statute or the constitutional requirements for standing. According to the Ninth Circuit, any officer, employee, or shareholder who suffers a "separate and distinct" injury as a result of discriminatory conduct involving a contract has a cause of action under § 1981, even if that person is not a party to the contract or otherwise involved in the contractual relationship. The practical consequence of this holding is that every employee, even of a nationwide corporation, would have a cause of action against a person or company who discriminated against the employer corporation, based on race, in its contractual dealings, so long as the employee is "embarrassed" or "humiliated" by the discrimination. This is a huge expansion of liability beyond that contemplated by the Civil Rights Act or recognized by other circuits.

The Ninth Circuit's tenuous reasoning and lack of analysis also deserves review by this Court, especially considering that the court's conclusion directly contradicts the well-reasoned holdings in other circuits. The issue of

standing under § 1981 has received a thorough and careful analysis by no less than four United States Courts of Appeals, and their unanimous verdict is that plaintiffs lacking a contractual relationship with a defendant have no standing under § 1981. The Ninth Circuit's rejection of this conclusion based solely on McDonald's allegations of separate and distinct injuries flies in the face of this Court's requirement that standing be premised on the zone of interests protected by the statute at issue.

The Ninth Circuit's failure, in *Gomez* and in this case, to make any inquiry into the basic requirements of standing under § 1981 leaves this area of law open to the possibility of widespread litigation, with little limitation on who can bring suit. The Civil Rights Act is a statute of national importance and deserves more careful review than it was given by the Ninth Circuit in this case. Domino's accordingly requests that this Court grant its petition.

CONCLUSION

For the reasons stated above, this Court should grant Domino's petition and clarify the scope of standing under § 1981.

Respectfully submitted,

DANIEL F. POLSENBERG
Counsel of Record
BEAU STERLING
HEIDI PARRY STERN
BECKLEY SINGLETON CHTD.
530 Las Vegas Boulevard,
Third Floor
Las Vegas, Nevada 89101
(702) 385-3373

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MCDONALD, Plaintiff-Appellant, v. DOMINO'S PIZZA, INC.; et al., Defendants-Appellees.	No. 02-16900 D.C. No. CV-02-00311-LRH/PAL MEMORANDUM* (Filed June 18, 2004)

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted December 4, 2003
San Francisco, California

Before: O'SCANNLAIN, HAWKINS, and FISHER, Circuit Judges.

Plaintiff-Appellant John McDonald appeals the district court's dismissal of his action brought under 42 U.S.C. § 1981. Because they are known to the parties, we do not recite the facts.

While a shareholder cannot maintain a civil rights action for injury suffered only by the corporation, *see Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969), we have acknowledged that "[t]he same discriminatory conduct can result in both corporate and individual

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

injuries." *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983). In *Gomez*, we held that a physician of Hispanic origin who practiced medicine as an employee of a professional corporation had standing to sue under 42 U.S.C. § 1981 when the defendant hospital rejected, for allegedly racial reasons, the corporation's contract proposal to operate the hospital's emergency room. *Id.* at 1021-22. The physician had alleged injuries distinct from that of the corporation, including loss of employment as director of the defendant's emergency room, as well as "humiliation and embarrassment." *Id.* at 1021.

Though our sister circuits may reach a contrary result, *see, e.g., Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1071-73 (10th Cir. 2002), *Gomez* squarely controls this case. While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JOHN McDONALD, Plaintiff, v. DOMINO'S PIZZA, LLC and DOMINO'S PIZZA, INC., a Michigan corporation; DEBBIE PEAR, individually, and JOHN DOES I through V, inclusive, DOE CORPORATIONS, VI through X, inclusive, Defendants.	CV-S-02-0311-LRH (PAL) ORDER (Filed Aug. 21, 2002)

Defendants filed a Motion to Dismiss on April 17, 2002, (Docket #7) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted and, simultaneously, filed a Motion to Quash Service for lack of personal jurisdiction over Defendant Deborah Pear Phillips. (#8). Plaintiff filed an Opposition on May 6, 2002 (#12) and a Supplement to the Opposition on May 9, 2002 (#13), while Defendants filed a Reply on May 17, 2002. (#15).

Oral argument was heard on August 13, 2002, and the Court allowed the parties to submit supplemental memoranda to discuss cases that were raised at oral argument.

The central issue here is: does Plaintiff John McDonald have standing to bring a § 1981 action as the President and sole shareholder of JWM Investments if

Defendant Dominos Pizza violated the civil rights of JWM Investments?

I. Motion to Dismiss

A. Standard of Review

In considering a motion to dismiss, this Court must presume all well-pleaded allegations of material fact and must draw all reasonable inferences in favor of the non-moving party. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000). However, the Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 231 F.3d 520, 527-28 (9th Cir. 2000). There is a strong presumption against dismissing an action for failure to state a claim. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The issue is not whether Plaintiff will ultimately prevail, but whether he offers evidence in support of his claims. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999). Consequently, the Court may not grant a Motion to Dismiss for failure to state a claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The liberal rules of notice pleading set forth in the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts supporting his claim. *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997) (quoting *Conley*, 355 U.S. at 47). All the Rules require is a "short and plain statement" that adequately gives the defendant "fair notice of what

the plaintiff's claim is and the grounds upon which it rests." *Yamaguchi*, 109 F.3d at 1481. Therefore, a plaintiff merely must plead sufficiently to "establish a basis for judgment against the defendant." *Id.* at 1481. Further, a claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks for improper relief. *Haddock v. Bd. of Dental Exam'r*, 777 F.2d 462, 464 (9th Cir. 1985).

B. Discussion

Section 1 of the Civil Rights Act of 1866 forbids discrimination on the basis of race in the making and enforcement of private as well as public contracts. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Title 42 of the United States Code, section 1981 provides, inter alia, that "[a]ll persons within the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. By its terms, section 1981 protects the contractual relationship itself and therefore limits the class of persons who may sue under section 1981 to persons in the contractual relationship. *See Kyles v. J.K. Guardian Security Serv., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000).

Plaintiff relies, in large measure, on the position expressed in two cases from the District of Colorado. In both cases, the president/sole shareholder of a corporation alleged that the defendant corporation failed to award the parties a contract because of the race of the president/sole shareholder. *Great American Tool and Mfg. Co. v. Adolph Coors Co.*, 780 F.Supp. 1354 (D. Colo. 1992); *Rosales v.*

AT&T Info. Systems, Inc., 702 F.Supp. 1489 (D. Colo. 1988). In *Great American Tool*, the court followed the holding in *Rosales* by stating that "the corporation could assert a § 1981 claim because the president and sole shareholder's race stamped it with a 'minority racial identity.'" *Great American Tool*, 780 F.Supp. at 1355; *Rosales*, 702 F.Supp. at 1497. The courts in *Rosales* and *Great American Tool* then reasoned that "if [the corporation] has a racial identity based on [the shareholder plaintiff's] race then the [shareholder plaintiff's] § 1981 claim would effectively merge with [the corporation's] § 1981 claim." *Great American Tool*, 780 F.Supp. at 1356 (quoting *Rosales*, 702 F.Supp. at 1497-98). Under this analysis, these courts concluded that the president/sole shareholder had standing to assert a race discrimination claim. *Great American Tool*, 780 F.Supp. at 1356; *Rosales*, 702 F.Supp. at 1498.

Defendants, on the other hand, rely on the basic proposition that a corporation is a separate legal entity from its stockholders and officers. Therefore, with limited exceptions, a stockholder (even a sole stockholder) is without standing to assert the rights of the corporation or seek recovery for wrongs suffered by the corporation. *Gersman v. Group Health Ass'n. Inc.*, 931 F.2d 1565, 1569 (D.C. Cir. 1991), *vacated*, 502 U.S. 1068 (1992), *adhered to, on remand*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); and *Ehrlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (holding that stockholder cannot maintain an action under the Civil Rights Act for damages suffered by a corporation).

Although the Ninth Circuit has not expressly addressed the issue presented in this case, it has addressed

the issue of a shareholder's standing to maintain a civil rights action in *Ehlich, supra. Ehrich*, in turn, is consistant with the Seventh Circuit decision in *Flynn v. Merrick*, 881 F.2d 446, 450 (7th Cir. 1989).

The problem with Plaintiff's Colorado cases is that the Tenth Circuit has, in effect, declared that they are no longer good law in Colorado and, therefore, essentially everywhere else. In *Guides, Ltd. v. Yarmouth Group Prop. Mgmt.*, 295 F.3d 1065 (10th Cir. 2002), the Tenth Circuit Court of Appeals held that while the a [sic] corporation had standing to assert a § 1981 claim, the sole shareholder and guarantor did not. *Id.* at 1072-73. This Court finds *Guides* compelling. As a consequence, this Court will follow the holdings of the District of Columbia and Tenth Circuits and find that while a corporation may assert a § 1981 claim, a president or sole shareholder may not step into the shoes of the corporation and assert that claim personally.

II. Conclusion

As a result of the foregoing, Defendants' Motion to Dismiss is GRANTED. (#7). Because the Motion to Dismiss renders Defendants' Motion to Quash Service for lack of personal jurisdiction over Defendant Deborah Pear (#8) moot, that motion is DENIED. The clerk is directed to close the file.

IT IS SO ORDERED.

DATED: August 21st, 2002

/s/ L. R. Hicks
LARRY R. HICKS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCDONALD, Plaintiff-Appellant, v. DOMINO'S PIZZA, INC.; et al., Defendants-Appellees.	No. 02-16900 D.C. No. CV-02-00311-LRH/PAL District of Nevada, Las Vegas ORDER (Filed Aug. 2, 2004)

Before: O'SCANNLAIN, HAWKINS, and FISHER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing.

Judge O'Scannlain voted to grant the petition for rehearing en banc. Judge Hawkins and Fisher voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

VICTOR M. PERRI, ESQ.
Nevada Bar No. 001267
633 South Fourth Street, Suite 4
Las Vegas, Nevada 89101
Telephone (702) 385-1340
Facsimile (702) 387-2484
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
* * *

JOHN McDONALD, Plaintiff, vs. DOMINO'S PIZZA, LLC, AND DOMINO'S PIZZA, INC., Michigan corporation; DEBBIE PEAR, individually, and JOHN DOES I through V, inclusive; and DOE CORPORATIONS VI through X, inclusive, Defendants.	CV-S-02-0311-LRH-PAL

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed Mar. 8, 2002)

COMES NOW, Plaintiff John McDonald ("McDONALD"), by and through counsel, Victor M. Perri, Esq., and for causes of action against Defendants, Dominoes Pizza (DOMINO'S), hereby complains and alleges as follows:

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 1988 to redress the deprivation of rights under the Fourteenth Amendment to the United States Constitution.

2. The jurisdiction of this Court is based upon 28 U.S.C. § 1343(3) and (4).

3. This Court is authorized to render declaratory relief under 28 U.S.C. § 2201 and 28 U.S.C. § 2202 as well as Rule 57 of the Federal Rules of Civil Procedure.

4. All discriminatory employment practices alleged herein were committed within the State of Nevada and therefore venue is proper in this Court.

PARTIES

5. Plaintiff John McDonald ("McDONALD") is and was at all times relevant thereto a resident of Clark County, State of Nevada.

6. McDONALD is African-American, and therefore is a member of a protected class.

7. Defendant DOMINO'S PIZZA, LLC, AND DOMINO'S PIZZA, INC., is a Michigan corporation engaged in the business of operating a nationwide pizza restaurant chain with purposeful and continuing contacts with the state of Nevada, engaging in the business of operating multiple restaurants in Nevada.

8. DEBBIE PEAR, (PEAR) a Real Estate Negotiator for DOMINO'S at all times relevant to this complaint was a resident of Michigan.

9. McDONALD is ignorant of the true names, identifies, and capactities of the Defendants sued under the fictitious names identified as JOHN DOES I through V,

inclusive, and DOE CORPORATIONS VI through X, inclusive. McDONALD is informed and believes that each of the Defendants fictitiously named acted or omitted to act as alleged herein, directly and proximately causing injury to McDONALD, for which they are consequently responsible. McDONALD shall seek to amend this Complaint to assert the true names and capacities, whether individual, corporate, or otherwise, as the Defendants are identified.

10. McDONALD in his capacity as President of JWM Investments, a Nevada Corporation, did contract with DOMINOES to build several stores for Defendant to lease in and around Las Vegas, Nevada.

STATEMENT OF FACTS

11. Plaintiff is the President, owner and operator of JWM Investments, Inc., (JWM) a Nevada Corporation. To McDONALD's information and belief he was the only black developer utilized by Domino's to construct in the Southwestern United States.

12. Plaintiff acting for JWM in January of 1997 entered into four corporately secured lease contracts to construct multiple restaurants in and around Las Vegas, Nevada, for DOMINO's to lease for a period of ten years with options to extend the leases. The leases were for restaurants to be constructed at Camino Al Norte in North Las Vegas, 4515 Bonanza Road in Las Vegas, at or near the intersection of Las Vegas Blvd. N. and Alexander, and at the intersection of Russell and Merrill St.

13. The contracts were amended in June of 1997 because DOMINO'S desired larger restaurants then originally agreed upon, which delayed construction, additionally Plaintiff did not contract with anyone for architecture

or interior design of the buildings as provided for by the lease.

14. The Camino Al Norte location was completed for DOMINO'S and the certificate of occupancy issued in May of 1998 well within the time frame dictated by the lease agreement.

15. The relationship between Plaintiff and DOMINO'S soured during construction of the Bonanza location. The location encountered problems with city zoning and Plaintiff put his full effort into getting the building constructed, as was recognized by local DOMINO'S employees.

16. The contracts between JWM and DOMINO'S stated that if required to do so for financing and/or sale purposes DOMINO'S would execute estoppel certificates for JWM.

17. Nonetheless Real Estate Negotiator for Dominoes, PEAR, refused to sign any requests sent on behalf of JWM.

18. PEAR called the Las Vegas Valley Water District and intentionally removed Plaintiff as landowner and falsely substituted herself and DOMINO'S. This required Plaintiff to personally go to the Water District and prove ownership of the land.

19. Plaintiff called PEAR on the phone and stated his determination to fulfill the contracts despite her attempts to interfere he would go forward with the project's completion. PEAR at this point told Plaintiff she would see to it that Plaintiff would experience serious financial reproductions and the loss of his business and financial position if he didn't voluntarily terminate his dealings with DOMINO'S after completing the Bonanza Road restaurant. Plaintiff then reminded PEAR he had four contracts with DOMINO'S

and explained that he intended to see them through to completion. PEAR then responded that she had little tolerance for dealing with Plaintiff and stated, "I don't like dealing with ***you people*** [s/ JMW] anyway." PEAR then refused to explain her "you people" comment and said she would see to it that DOMINO'S did no further business with Plaintiff and threatened to use the company's attorneys to bury Plaintiff in the event a court action was initiated and further told Plaintiff he, "didn't have a chance in Hell," of winning and hung up before Plaintiff could respond

20. After that call Plaintiff's dealings with DOMINO'S were routed to Vice President and General Counsel Joe Graziani.

21. Mr. Graziani told Plaintiff that despite PEAR's comments DOMINO'S would move on further with the lease contracts and sign the estoppel certificates only if Plaintiff agreed to amend the contracts. To McDONALD's information and belief DOMINO'S failed and refused to investigate whether PEAR was acting in an arbitrary and discriminatory manner towards McDONALD after McDONALD complained about PEAR to Mr. Graziani.

22. DOMINO'S refusal to provide the necessary estoppel certificates caused Plaintiff to lose financing for the projects which had not been started.

23. To the extent DOMINO'S allowed him to by their breach of contract Plaintiff performed his obligations under the contract to the specifications set out by Dominoes.

24. During this frustrating process Plaintiff had numerous construction offers which he was unable to secure because DOMINO'S intentionally ignored document requests. JWM also had potential sales of real properties with purchases which failed to close because of

the refusal to sign estoppel certificates and to abide my contractual obligations with JWM due to racial animus towards McDONALD.

25. As Plaintiff's business depends on the ability to secure land in order to prosper, he was unable to move forward with other projects or these projects without the estoppel certificates.

26. Additionally Plaintiff was forced by DOMINO'S refusal to sign the estoppel certificates to sit on the land he already possessed and not develop, sell or lease them.

27. DOMINO'S thus locking up of resources caused the corporation, JWM Investments, Inc, wholly owned by McDONALD as a minority business to have to file chapter 11 Bankruptcy.

28. DOMINO'S further breached their contractual obligations by failing to pay rent on completed restaurants which they had already occupied, after JWM Investments, Inc. filed a Chapter 11 Bankruptcy Case No. 00-19303 LBR planning or anticipating the financial collapse of JWM and McDONALD.

29. Prior to PEAR and GRAZIANI being assigned to oversee the contract with JWM, DOMINO'S dealt with JWM in good faith.

30. Once assigned to the JWM contract PEAR and GRAZIANI did purposefully act on behalf of DOMINO'S to breach the contracts between JWM and DOMINO'S and refuse to act in good faith to allow JWM to perform.

31. Plaintiff repeatedly attempted to settle this matter with DOMINO'S without filing a lawsuit. In settlement discussions DOMINO'S was more interested in attacking Plaintiff personally then in resolving the matter.

FIRST CAUSE OF ACTION

VIOLATION OF 42 U.S.C. SECTION 1981

32. McDONALD restates and realleges each and every allegation contained in paragraphs 1 through 32 inclusive and incorporates those paragraphs herein by reference.

33. 42 U.S.C. § 1981, as amended, guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

34. 42 U.S.C. § 1981, as amended, prohibits racially discriminatory conduct that occurs from the inception through the end of a contract.

35. McDONALD is a person as encompassed within the meaning of 42 U.S.C. § 1981.

36. As a resident of Nevada, McDONALD is within the jurisdiction of the United States.

37. At all times relevant thereto, McDONALD acting for JWM had contracts with DOMINO'S, which contained all of the essential elements of a valid contract: offer, acceptance, and bargained for consideration.

38. DOMINO'S offered, explicitly, to pay JWM operated by McDONALD for performance of services.

39. McDONALD accepted that offer by JWM's construction of the restaurants, which constitutes performance, for DOMINO'S to lease.

40. McDONALD's performance through JWM of services for DOMINO'S served as consideration for DOMINO'S promise to pay him for his services.

41. DOMINO'S promise to lease from McDONALD the completed restaurants served as consideration for his performance under the contract.

42. DOMINO'S purposefully failed to perform its obligations under the contract.

43. Upon information and belief Plaintiff believes DOMINO'S has not failed to perform similar obligations with non-minority businesses.

44. The acts as previously stated constitute racially discriminatory conduct that occurred during the term of a contract.

45. The above discriminatory acts and practices by DOMINO'S constitute racially discriminatory conduct during the term of a contract as prohibited by 42 U.S.C. § 1981..

46. As a result of Defendant's discriminatory acts, McDONALD has suffered, is suffering and will continue to suffer monetary damages and damages for pain and suffering, emotional distress, and humiliation unless and until this court grants relief, all in an amount in excess of $10,000.00, to be determined at trial.

47. DOMINO'S acted oppressively, fraudulently, maliciously, and in bad faith towards McDONALD to deprive him of his legal and statutory rights and in bad faith with conscious disregard for McDONALD' known rights. In so acting DOMINO'S intended and did vex, injure and harm McDONALD in a willful, oppressive and deliberate manner, which should be determined by the court for which McDONALD respectfully requests punitive or exemplary damages in an amount in excess of $10,000.00.

WHEREFORE, McDONALD requests this honorable court to enter judgment as follows:

1. Enjoining and permanently restraining the violations of Title VII, 42 U.S.C. § 1981;

2. Requiring Defendant to pay all of its obligations under the contracts which McDONALD would have received, but for the discriminatory practices, including, but not limited to front pay, back pay and other lost benefits;

3. Awarding compensatory damages for pecuniary losses, including pain and suffering, emotional distress, mental anguish, and humiliation in an amount to be determined at trial;

4. Awarding punitive damages to McDONALD;

5. Awarding McDONALD the costs of this action together with reasonable attorney's fees; and

6. Such other and further relief as this court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, McDONALD demands a trial by jury in this action.

Dated this 8 day of March, 2002.

Respectfully submitted by

/s/ Victor M. Perri
Victor M. Perri, Esq.
Nevada Bar No. 001267
VICTOR M. PERRI & ASSOCIATES
633 South Fourth Street, Suite 4
Las Vegas, Nevada 89101
Telephone (702) 385-1340
Telefacsimile (702) 387-2484
Attorney for Plaintiff

VERIFICATION OF JOHN McDONALD

STATE OF NEVADA)
) :ss.
COUNTY OF CLARK)

JOHN McDONALD, under penalty of perjury, being first duly sworn, deposes and states:

That he is the Plaintiff in the above-entitled action; that he has read the foregoing **VERIFIED COMPLAINT AND DEMAND FOR JURY** and knows the contents thereof; that the same is true of his own knowledge, except those matters therein contained stated upon information and belief, and as to those matters, he believes them to be true.

DATED this 8th day of March, 2002.

/s/ John McDonald
JOHN McDONALD

SUBSCRIBED AND SWORN
to before me on this 8th day of
March, 2002.

/s/ Sarah Daniels
NOTARY PUBLIC, In and For
Said County and State

(SEAL)
No: 92-3065-1
NOTARY PUBLIC
STATE OF NEVADA
County of Clerk
SARAH DANIELS
My Appointment
Expires Sept. 26, 2005

CERTIFICATE OF MAILING

On the 8th day of March, 2002 I, as an employee of Victor M. Perri, Esq., hereby certify that I mailed the foregoing VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL to the parties hereto, first class mail, with postage full prepaid thereon, addressed as follows:

Kaaren Thomas, Esq.
BECKLEY SINGLETON
530 Las Vegas Blvd. So.
Las Vegas, Nevada 89101

/s/ Jessica Daniels
Jessica Daniels, an employee
of Victor M. Perri, Esq.

No. 04-593

Supreme Court, U.S.
FILED
MAR 10 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC. AND DEBBIE PEAR,

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

ALLEN LICHTENSTEIN
Counsel of Record
3315 Russell Road, No. 222
Las Vegas, NV 89120
(702) 433-2666

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does Respondent John McDonald, president and sole shareholder of JWM Investments, Inc., have standing to assert personal claims, under 42 U.S.C. § 1981, for defamation and racial discrimination, even though JWM was also harmed?

CORPORATE DISCLOSURE STATEMENT

Respondent John McDonald is not a corporation that has issued shares to the public, nor is he a parent corporation, subsidiary, or affiliate of corporations that have done so.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. Piecemeal review by this Court does not serve the goal of judicial efficiency	5
II. *Gomez v. Alexian Brothers Hospital of San Jose* need not be overruled	6
III. Any conflict with other Circuits is not significant	7
IV. This case does not require immediate review	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999) 8, 9

Gomez v. Alexian Brothers Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983) 6, 7, 9

Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc., 295 F.3d 1065 (10th Cir. 2002) 9

Kasky v. Nike, 539 U.S. 654 (2003) 5

Kyles v. J.K. Guardian Security Services, 222 F.3d 289 (7th Cir. 2000) 7, 8

Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990) 8

STATUTES

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1985(a) 6

42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) 6, 7, 8

STATEMENT OF THE CASE

This case involves the claim by Respondent, John McDonald, an African-American, for violation of 42 U.S.C. § 1981 racial discrimination. As set forth in the Complaint (App. 11-14), Mr. McDonald was the sole officer, director, and stockholder of JWM Investments, Inc., a Nevada Corporation. Acting for JWM, in January 1997, McDonald entered into four corporately secured lease contracts to construct restaurants in and around Las Vegas, Nevada for Domino's Pizza to lease. To McDonald's information and belief, he was the only African-American developer utilized by Domino's Pizza to construct restaurants in the Southwestern United States.

The lease in question was for a ten-year period with options to extend. A key provision stated that Domino's would execute estoppel certificates for the properties if required to do so for financing and/or sale purposes. When the necessity arose, however, Debbie Pear the Real Estate Negotiator for Domino's, refused to sign any requests sent on behalf of JWM by McDonald. McDonald was startled by these turn of events, for he was informed and believed that Pear and Domino's regularly performed on their contracts with other contractors, who were white.

Pear's refusal to comply with the terms of the contract was the first of many indignities to McDonald. She subsequently called the Las Vegas Valley Water District to remove JWM as landowner and falsely substitute herself and Domino's. This illicit action required McDonald to meet with Water District authorities and prove ownership of the land.

Despite these affronts, McDonald telephoned Pear to reiterate his determination to fulfill the contracts. In

response, Pear told McDonald she would see to it that McDonald personally would experience serious financial repercussions and the loss of his business and financial position if he didn't voluntarily terminate his dealings with Domino's after completing the Bonanza Road restaurant. McDonald then reminded Pear that JWM had four contracts with Domino's and he intended to see them through to completion. Pear replied that she had little tolerance for working with him, stating: "I don't like dealing with you people anyway." Shocked by this "you people" remark, McDonald prodded Pear for an explanation, but she refused one. Pear declared, however, she would personally see to it that Domino's did no further business with McDonald and threatened to use company attorneys to bury McDonald if he initiated a court action. The conversation concluded with Pear informing McDonald that he "didn't have a chance in hell," of winning. She then slammed down the receiver before McDonald could respond.

After that telephone conversation, Domino's routed McDonald's calls to Vice President General Counsel Joe Graziani. Mr. Graziani informed McDonald that despite Pear's comments, Domino's would honor the lease contracts and sign the estoppel certificate, but only if McDonald agreed to amend the contracts. Because McDonald refused to amend the contracts, Domino's denied McDonald the necessary estoppel certificates to which both parties had previously contracted and were rightfully McDonald's.

Despite Domino's refusal to satisfy their contractual promises, McDonald performed his obligations to the specifications set out by Domino's. Fulfilling the terms proved to be an extremely frustrating and costly process,

however. Since Domino's refused to sign the estoppel certificates, McDonald had to forgo numerous construction offers, lost financing for projects not yet started, and was unable to realize potential sales of real property. Because McDonald's business depends entirely on his ability to secure land and then develop, sell, or lease it, Domino's refusal to make good on the estoppel certificates locked up JWM's resources, thus jeopardizing McDonald's company.

McDonald's financial situation was further damaged by two events: (1) When Domino's failed to pay rent on the completed restaurants they already occupied; and (2) by Pear's derogatory statements about McDonald to Steward Olson, the chief lending officer for Nevada First Bank, who had formerly agreed to finance the construction of two of the restaurants. According to Mr. Olson, Pear's statement caused him to believe that McDonald was personally dishonest and untrustworthy. With few resources and fewer prospects, JWM filed for chapter 11 Bankruptcy (*In Re JWM Investments, Inc.*, Case No. 00-19303 LBR, U.S. Bankruptcy Court, District of Nevada).

Subsequent to Domino's discriminatory measures, McDonald's personal net worth collapsed by as much as $8,000,000. A half a million of this amount came from personal certificates of deposit he had pledged against the loans. Because of the bankruptcy and personal defamation, his credit is now ruined. Furthermore, McDonald had been unable to finance a piece of property he holds as well as a hospital loan and medical office building under development. With regard to insurance matters, McDonald cannot acquire general liability insurance to insure his business office and its grounds, and home-owners insurance for his family home.

McDonald has also suffered severe emotional distress: His blood pressure soared and he gained a hundred pounds. To lose weight and keep from gaining more, McDonald had gastric bypass surgery. At this time, a portion of his stomach and gall bladder, damaged from stress, were removed as well.

On March 8, 2002, McDonald, filed this case against Domino's Pizza, LLC, Domino's Pizza, Inc. and Debbie Pear. The action was prompted by acts of racial discrimination against Mr. McDonald personally that abridged his right to contract and caused him monetary damages and damages for pain and suffering, emotional distress, mental anguish, humiliation. Moreover, Domino's ruined McDonald's credit and ability to get insurance for business and personal ventures. Respondent brought this action under 42 U.S.C. § 1981, as amended, which guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." App. 15-17.

On August 21, 2002, in an unpublished opinion, the District Court granted Domino's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. Petitioners did not dispute the facts alleged in the Complaint, but argued that McDonald had no standing to either enforce the contract or to seek damages, since his company, JWM Investments, Inc. was party to the agreement rather than McDonald personally. App. 3-7.

A three-judge panel of the Court of Appeals for the Ninth Circuit reversed the District Court's ruling in an unpublished memorandum on June 18, 2004 stating that McDonald personally alleged discriminatory injuries

separate and apart from those of JWM. App. 1-2. On August 2, 2004, Domino's petition for rehearing and petition for rehearing en banc were denied. App. 8.

REASONS FOR DENYING THE WRIT

I. Piecemeal review by this Court does not serve the goal of judicial efficiency.

Domino's Pizza, Inc., et al. (Domino's) has petitioned for a writ of certiorari to reverse the Court of Appeals unpublished determination that John McDonald has standing to bring a cause of action under 42 U.S.C. § 1981. The appellate decision creates no precedent, being limited only to the instant case. Thus, it is similar to the situation in *Kasky v. Nike*, 539 U.S. 654, 660 (2003), where this Court concluded that a review prior to the trial court determination on the merits might result in piecemeal review that would not serve the goal of judicial efficiency.

Here, as in *Kasky*, "an opinion on the merits in this case could take any one of a number of different paths." Domino's might prevail on the merits, rendering the current writ moot. While the District Court's decision was final, in that it precluded any determination on the merits, the Court of Appeals' reversal of that decision did no more than open the case for the trier of fact. The case is ongoing. Thus, the logic in *Kasky* suggests that judicial efficiency would not be served by a grant of the writ at this time.

II. *Gomez v. Alexian Brothers Hospital of San Jose* need not be overruled.

Although Domino's petition concerns the unpublished June 18, 2004 memorandum by the United States Court of Appeals for the Ninth Circuit (App. 1-2) and the August 2, 2004 unpublished order denying rehearing and denying rehearing en banc (App. 8), the gist of its argument is an attack on the 1983 case of *Gomez v. Alexian Brothers Hospital of San Jose*, 698 F.2d 1019 (9th Cir. 1983).

The issue there was whether that plaintiff, a physician of Hispanic ancestry who practiced medicine under a corporation (AES), had standing under Title VII, § 1981, and 42 U.S.C. § 1985(a) to recover damages for the rejection, based on racial animus, of a contract between the hospital and plaintiff's corporation. The Court held that Gomez had standing under all these acts because the hospital's discriminatory actions – statements by the *Gomez* defendant's counsel that "a proposal with too may brown faces will not fly," and that awarding a contract to AES would transform the hospital "into a Mexican Institution," – resulted in personal injuries to Gomez, distinct from those injuries suffered by AES. *Id.* at 1020-21.

Domino's argues that *Gomez's* holding concerning § 1981 is irrelevant for two reasons: (1) very little discussion is specifically devoted to § 1981 (Pet. p. 8) and (2) "once a court has concluded that Title VII applies, § 1981 becomes in effect, superfluous." (Pet. p. 9, n. 5) A careful reading of the *Gomez* decision refutes these arguments. The case begins with an analysis of the requirements for standing – "injury-in-fact" and "distinct and palpable injury" – as it pertains to all acts under which plaintiff sued. *Id.* at 1021-20. The Appellate Court reversed the

District Court, holding that because the humiliation and embarrassment suffered by plaintiff as a result of employment deprivation were, in fact, personal injuries, § 1981 standing existed. *Id.* at 1022.

Petitioners argue that *Gomez* is "first and foremost a Title VII case" because its discussion of Title VII is lengthier than its discussion of § 1981. Obviously the length of discussion is not a measure of the nature of the decision. Contrary to Petitioners' argument, issues that are dealt with in fewer sentences are generally those for which there is little dispute. Where the law is more ambiguous more discussion is needed.

In *Gomez*, the Court wrote a few paragraphs of analysis to determine whether Title VII was intended to cover both employment and independent contractor relationships, and concludes that it does. This conclusion does not undermine the Court's holding that *Gomez* had § 1981 standing, a conclusion that the Court found no need to expound upon at length. It is important to note that Dominos's appears to take two contradictory positions concerning *Gomez's*. The first is that the case's treatment of § 1981 standing is superfluous, while the second is that *Gomez* must be overturned because of case's treatment of that issue. Both of these are incorrect.

III. Any conflict with other Circuits is not significant.

The cases from other jurisdictions, cited in Domino's petition, do little to undermine the basic premise articulated in *Gomez,* that a plaintiff who shows individual injuries from specific discriminatory actions aimed at him has standing to sue under 42 U.S.C. § 1981. In *Kyles v.*

J.K. Guardian Security Services, 222 F.3d 289 (7th Cir. 2000), the Court held that minority job testers had standing under Title VII but not under § 1981. There, however, § 1981 standing was denied because the *Kyles* plaintiffs never sought a contractual relationship. Thus, the tester's injury, if any, was one that "lies outside the zone of interests that § 1981 protects." *Id.* at 304.

Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990), is also distinguishable. Searcy brought suit on behalf of himself and his company because defendants refused to grant him a contract. The reason for this denial was not based on discrimination. Moreover, unlike the instant case, Searcy made no claim of individual discrimination or harm, beyond that suffered by the corporation. *Id.* at 564.

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, (1st Cir. 1999), dealt with the question of whether the fact that an employee may sue under § 1981 on a hostile work environment theory, also means that an independent contractor can do so. 178 F.3d at 13. Only as an aside did the Court deal with the issue of § 1981 standing for individual plaintiffs. The Court stated that had the issue been raised, it would have held that the corporation, instead of its sole shareholder, had a "potential" claim under § 1981 because the contract in question was between Wal-Mart and Danco, and the suffering of the sole shareholder is "not automatically damage to Danco." *Id.* at 14. The Court explained that although the shareholder was damaged by racial incidents, Danco was not. *Id.* at 14-15.

The contract was henceforth terminated because Wal-Mart was unhappy with Danco's performance on the contract (indeed, Wal-Mart had received notification from

the Maine Department of Environmental Protection that sand removal was inadequate). *Id.* at 11. Because the contract was terminated for reasons other than racial discrimination, neither corporation nor individual were entitled to § 1981 standing. Thus this case had little bearing on the issue in the instant one.

Domino's cites *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (10th Cir. 2002), for the proposition that an individual plaintiff has no standing to pursue a § 1981 claim when her emotional distress arises from the failure of defendants to contract with her corporation. *Id.* at 1072. In *Guides*, the Court simply found plaintiff's emotional distress the result of the economic damages suffered by her corporation. Because, the claim was neither personal nor distinctive, she had no personal standing under § 1981. *Id.* at 1072-73. The 10th Circuit case suggests not a blanket ban of individual standing in § 1981 cases, but the requirement for separate discrimination and damage to the individual.

IV. This case does not require immediate review.

Domino's argues that the petition should be granted because the Ninth Circuit's decision will "open the floodgates" to ill advised § 1981 claims within the Circuit. (Pet. p. 16) However, as the appellate decision is unpublished and "may not be cited to or by the courts of this [Ninth] Circuit," (App. 1), there is little if any possibility that the decision will have such an impact. Nor have Petitioners shown any immediate need for an immediate review of *Gomez, supra*. It has been twelve years since that decision, with little of the monumental consequences suggested in the petition.

The decision by the Court of Appeals did little, if anything, to alter the status quo in terms of standing to bring a § 1981 action. Thus, the goal of judicial efficiency and the desire to avoid the possibility of piecemeal litigation clearly outweighs any desire on the part of Petitioners for immediate review by this Court.

CONCLUSION

For all the foregoing reasons the writ of *certiorari* should be denied.

Respectfully submitted,

ALLEN LICHTENSTEIN
Counsel of Record
3315 Russell Road, No. 222
Las Vegas, NV 89120
(702) 433-2666

Attorney for Respondent

Dated: March 10, 2005

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-593

In the Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

PETITIONERS,

v.

JOHN MCDONALD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

Counsel for Respondent

ALLEN LICHTENSTEIN
Counsel of Record
3315 RUSSELL ROAD
NO. 222
LAS VEGAS, NV 89120
(702) 433-2666

Counsel for Petitioners

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

PETITION FOR CERTIORARI FILED NOVEMBER 1, 2004
CERTIORARI GRANTED APRIL 25, 2005

JOINT APPENDIX
TABLE OF CONTENTS

Page

United States Court of Appeals for the Ninth Circuit Relevant Docket Entries: *McDonald v. Domino's Pizza, Inc., et al.*, No. 02-16900 1

United States District Court for the District of Nevada Relevant Docket Entries: *McDonald v. Domino's Pizza, LLC, et al.*, No. CV-S-02-0311-LRH-PAL 5

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (Nov. 1, 2004)

Unpublished Opinion of the United States Court of Appeals for the Ninth Circuit, *McDonald v. Domino's Pizza, Inc., et al.*, No. 02-16900 (9th Cir. June 18, 2004) ..... App. 1

Order, *McDonald v. Domino's Pizza, LLC, et al.*, No. CV-S-02-0311-LRH (PAL) (D. Nev. Aug. 21, 2002) ..... App. 3

Order denying rehearing, *McDonald v. Domino's Pizza, Inc., et al.*, No. 02-16900 (9th Cir. Aug. 2, 2004) ..... App. 8

Verified Complaint and Demand for Jury Trial, *McDonald v. Domino's Pizza, LLC*, No. CV-S-02-0311-LRH-PAL (D. Nev. Mar. 8, 2002) ..... App. 9

RELEVANT DOCKET ENTRIES

McDonald v. Domino's Pizza, Inc., et al.

United States Court of Appeals
for the Ninth Circuit

No. 02-16900

10/1/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : no. setting schedule as follows: appellant's opening brief is due 11/12/02; appellees' brief is due 12/12/02, ; appellants' reply brief is due 12/26/02; [02-16900] (dg)
10/1/02	Filed certificate of record on appeal RT filed in DC N/T [02-16900] (dg)
10/1/02	Filed Civil Appeals Docketing Statement served on (to CONFATT) [02-16900] [02-16900] (dg)
10/3/02	Amended first page of the DC docket sheet to show that the jurisdiction is a federal question not a U.S. plaintiff. (casefile) [02-16900] (dg)
	* * *
1/13/03	Filed original and 15 copies Appellant John McDonald's opening brief (Informal: NO) 26 pages and five excerpts of record in 1 volumes; served on 1/9/03 [02-16900] (sm)
	* * *

2/24/03	Filed original and 15 copies appellees Domino's Pizza, Inc. and Debbie Pear's 22 pages brief, 1 Exc. vols; served on 2/21/03 [02-16900] (sm)
	* * *
3/25/03	Filed original and 15 copies John McDonald reply brief, (Informal: n) 18 pages; served on 3/24/03 [02-16900] (ji)
	* * *
4/23/03	FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD & 1 REPORTER'S TRANSCRIPT. (ORIGINAL) [02-16900] (sd)
	* * *
10/10/03	CALENDARED: SAN FRAN Dec 5 2003 900 am Courtroom 4 ** moved to THU Dec 4 2003 900 am ** [02-16900] (aw)
11/26/03	Filed order (Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Raymond C. FISHER,): At oral argument, the parties shall be prepared to discuss RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1057 (9th Cir. 2002). (PHONED OUT 5:05) [02-16900] (hh)
12/4/03	ARGUED AND SUBMITTED TO Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Raymond C. FISHER [02-16900] (wf)

6/18/04	FILED MEMORANDUM DISPOSITION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed and Remanded; Written, Unsigned, Unpublished. Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Raymond C. FISHER) FILED AND ENTERED JUDGMENT. [02-16900] (ji)
7/6/04	Filed motion and deputy clerk order: (Deputy Clerk: ji) granting motion & order to extend time to file a petition for rehearing. PFR/EB due 7/9/04. (Motion recvd 7/6/04) [02-16900] (ji)
7/6/04	Filed original and 50 copies Appellee Domino's Pizza, Inc., Appellee Debbie Pear petition for panel rehearing and petition for rehearing en banc 10 p.pages, served on 7/2/04 (panel and active judges) [02-16900] (ji)
7/8/04	Check number 105520 in the amount of 250.00 returned to Beckley Singleton, 530 Las Vegas BLVD, S, Las Vegas, NV 89101. (see case file) [02-16900] (rr)
8/2/04	Filed order (Diarmuid F. O'SCANNLAIN, Michael D. HAWKINS, Raymond C. FISHER,): The petition for rehearing and the petition for rehearing en banc are denied. [02-16900] (ji)
8/10/04	MANDATE ISSUED [02-16900] (ji)

11/8/04	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 4-593 filed on 11/1/04. [02-16900] (ji)
5/2/05	Received notice from Supreme Court, petition for certiorari GRANTED on 4/25/05 . Supreme Court No. 4-593 (panel) (ji)

McDonald v. Domino's Pizza, LLC, et al.

United States District Court for the District of Nevada

No. CV-S-02-0311-LRH-PAL

Doc. #: **Date Filed:** 5/10/2002
Status: / **EOD:**
Docket Type: EVENT
Docket Title: SUMMONS ISSUED
Judge:
Caption: (1) as to Dfts.

Doc. #: **Date Filed:** 3/13/2002
Status: / **EOD:**
Docket Type: EVENT
Docket Title: SUMMONS ISSUED
Judge:
Caption: (3) as to Dfts.

* * *

Doc. #: 1 **Date Filed:** 3/8/2002
Status: **EOD:**
Docket Type: COMPLAINT
Docket Title:
Judge:
Caption: by Plf w/jy dmd and receipt #56473

* * *

Doc. #: 3 **Date Filed:** 3/20/2002
Status: / **EOD:**
Docket Type: CERTIFICATE OF INTERESTED PARTIES
Docket Title:
Judge:
Caption: by Plf. (nss)

Doc. #: 4 **Date Filed:** 4/1/2002
Status: / **EOD:**
Docket Type: SUMMONS SERVED
Docket Title:
Judge:
Caption: upon Dft Domino's Pizza, LLC on 3/25/02.

Doc. #: 5 **Date Filed:** 4/1/2002
Status: / **EOD:**
Docket Type: SUMMONS SERVED
Docket Title:
Judge:
Caption: upon Dft Domino's Pizza, Inc. on 3/25/02.

Doc. #: 6 **Date Filed:** 4/5/2002
Status: / **EOD:**
Docket Type: SUMMONS SERVED
Docket Title:
Judge:
Caption: upon Dft Debbie Pear-Phillips on 3 /27/02.

Doc. #: 7 **Date Filed:** 4/17/2002

Status: Disposed **EOD:**

Docket Type: MOTION/DISPOSITIVE

Docket Title: DISMISS

Judge:

Caption: by Dfts. (m) DISPO: oppo (#11), supp (#13), reply (#15), reply (#16), orders (#17,25), reply (#27) GRANTED per (#28)

Doc. #: 8 **Date Filed:** 4/17/2002

Status: Disposed **EOD:**

Docket Type: MOTION/NON-DISPOSITIVE

Docket Title: QUASH

Judge:

Caption: by Dfts. to quash svc of sums. (m) DISPO: oppo (#12), reply (#15), order (#25) MOOT per (#28)

Doc. #: 9 **Date Filed:** 4/18/2002

Status: / **EOD:**

Docket Type: OTHER

Docket Title: REQUEST

Judge:

Caption: Req by Dfts for oral argument on Dfts' mtn to dism (#7). (m)

Doc. #: 10 **Date Filed:** 4/18/2002

Status: / **EOD:**

Docket Type: OTHER

Docket Title: REQUEST

Judge:

Caption: by Dfts for oral argument on Dfts' mtn to quash svc of sums. (m)

Doc. #: 11 **Date Filed:** 5/6/2002

Status: / **EOD:**

Docket Type: RESPONSE

Docket Title: OPPOSITION

Judge:

Caption: by Plf to Dfts' mtn to dism (#7). (m)

Doc. #: 12 **Date Filed:** 5/6/2002

Status: / **EOD:**

Docket Type: RESPONSE

Docket Title: OPPOSITION

Judge:

Caption: by Plf to Dfts' mtn to quash (#8). (m)

Doc. #: 13 **Date Filed:** 5/9/2002

Status: / **EOD:**

Docket Type: SUPPLEMENT

Docket Title:

Judge:

Caption: by Plf to Plf's oppo (#11) to Dfts' mtn to dism (#7). (m)

* * *

Doc. #: 15 **Date Filed:** 5/17/2002
Status: / **EOD:**
Docket Type: RESPONSE
Docket Title: REPLY
Judge:
Caption: by Dfts to Dfts' mtn to dism (#7)/quash (#8). (m)

Doc. #: 16 **Date Filed:** 5/17/2002
Status: / **EOD:**
Docket Type: RESPONSE
Docket Title: REPLY
Judge:
Caption: by Dfts to Dfts' mtn to dism (#7). (m)

Doc. #: 17 **Date Filed:** 6/26/2002
Status: / **EOD:**
Docket Type: ORDER
Docket Title:
Judge: LRH
Caption: that Dfts' mtn to dism (#7) is sched for hrg on 8/13/02 @ 1:00 pm. (cps dist)

* * *

Doc. #: 25 **Date Filed:** 8/13/2002

Status: / **EOD:**

Docket Type: MINUTES OF PROCEEDINGS

Docket Title: HEARING

Judge: LRH

Caption: re mtn hrg on 8/13/02. ORDERED cnsl may add briefing until 8/16/02. ORDERED matter is taken under sub and will issue a ruling within 2-3 weeks. Ct rptr: Felecia Zabin. (cps dist)

* * *

Doc. #: 27 **Date Filed:** 8/16/2002

Status: / **EOD:**

Docket Type: RESPONSE

Docket Title: REPLY

Judge:

Caption: (Supp) by Dfts to Dft's mtn to dism (#7). (m)

Doc. #: 28 **Date Filed:** 8/21/2002

Status: / **EOD:**

Docket Type: Order

Docket Title:

Judge: LRH

Caption: that Dft's mtn to dism (#7) is granted. Dfts' mtn to quash (#8) is denied as moot. Clerk shall close file. (cps dist)

Doc. #: 29 **Date Filed:** 8/22/2002

Status: **EOD:**

Docket Type:
JUDGMENT

Docket Title:

Judge: LSW

Caption: that Dfts' mtn to dism (#7) is granted. Jgm is entered in favor of Dfts and against Plf. (cps dist)

Doc. #: 30 **Date Filed:** 9/18/2002

Status: **EOD:**

Docket Type: NOTICE OF APPEAL

Docket Title:

Judge:

Caption: by Plf to jgm (#29) and order (#28). (m)

Doc. #: 31 **Date Filed:** 9/18/2002

Status: / **EOD:**

Docket Type: RECEIPT OF PAYMENT

Docket Title:

Judge:

Caption: by Plf of $105.00 appeal filing fee w/receipt #61556.

Doc. #: 32 **Date Filed:** 9/23/2002

Status: / **EOD:**

Docket Type: TRANSMITTAL

Docket Title:

Judge:

Caption: (Copy) by Clerk of ntc of appeal (#30), jgm (#29), order (#28), cv appeals docketing stmt, and cert copy of docket sheet. (cps dist)

Doc. #: 33 **Date Filed:** 10/7/2002

Status: / **EOD:**

Docket Type: TRANSMITTAL

Docket Title:

Judge:

Caption: (Returned) by USCA of ntc of appeal w/case #02-16900.

* * *

Doc. #: 35 **Date Filed:** 12/9/2002

Status: **EOD:**

Docket Type: ORDER

Docket Title:

Judge: 9CA

Caption: by USCA that appeal will not be included in Mediation Program.

Doc. #: 36 **Date Filed:** 3/3/2003

Status: **EOD:**

Docket Type: TRANSCRIPT OF PROCEEDINGS

Docket Title: HEARING

Judge:

Caption: held 8/13/02 re Def's Mtn to Dism (#7) & Mtn to Quash (#8) (c/r F. Zabin)

Doc. #: 37 **Date Filed:** 4/17/2003

Status: **EOD:**

Docket Type: TRANSMITTAL

Docket Title:

Judge:

Caption: to C/A re Rcrd on Appeal shipped to C/A this date via UPS – 1 vol clks recrd. cpys dist.

Doc. #: 38 **Date Filed:** 5/12/2003

Status: **EOD:**

Docket Type: TRANSMITTAL

Docket Title:

Judge:

Caption: Reporters transcript (1) sent to C/A rec. 4/23/03

* * *

Doc. #: 40 **Date Filed:** 6/21/2004
Status: **EOD:**
Docket Type: MEMORANDUM
Docket Title:
Judge: 9CA
Caption: by USCA that action is reversed and remanded.

Doc. #: 41 **Date Filed:** 8/12/2004
Status: **EOD:**
Docket Type: MEMORANDUM
Docket Title:
Judge: 9CA
Caption: by USCA that action is reversed and remanded.

Doc. #: 42 **Date Filed:** 8/12/2004
Status: Disposed – 43 **EOD:**
Docket Type: JUDGMENT
Docket Title:
Judge: 9CA
Caption: by USCA that action is reversed and remanded.

Doc. #: 43 **Date Filed:** 8/24/2004
Status: Disposed – 44 **EOD:**
Docket Type: ORDER ON MANDATE
Docket Title:
Judge: LRH
Caption: that district court jgm is reversed and remanded. (cps dist)

* * *

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-593

In the Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

PETITIONERS,

v.

JOHN MCDONALD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

ELISA D. GARCIA C.
JOEL F. GRAZIANI
DOMINO'S PIZZA LLC
30 FRANK LLOYD WRIGHT DRIVE
ANN ARBOR, MI 48106-0997
(734) 930-3678

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

RULE 29.6 STATEMENT

Petitioner Domino's Pizza LLC, a Michigan limited liability company, is the successor-in-interest to Petitioner Domino's Pizza, Inc., formerly a Michigan corporation.

Neither Petitioner is publicly traded. The ultimate parent company of Domino's Pizza LLC is Domino's Pizza, Inc. (a different entity from Petitioner Domino's Pizza, Inc., which no longer exists), a Delaware corporation, that is publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. A DISCRETE "INDIVIDUAL" INJURY DOES NOT CREATE STATUTORY STANDING OR A FEDERAL CAUSE OF ACTION 9

II. SECTION 1981 DOES NOT AUTHORIZE SUIT BY PERSONS WHO HAVE NOT BEEN DENIED THE RIGHT TO "MAKE AND ENFORCE CONTRACTS" 14

A. Section 1981 Protects Only A Specific, Personal Right To "Make And Enforce Contracts" Free From Discrimination 14

TABLE OF CONTENTS—Continued

Pages

B. Section 1981 Does Not Grant Third-Party Standing To Persons Whose Own Right To "Make And Enforce Contracts" Has Not Been Violated 20

III. MCDONALD LACKS STANDING OR A CAUSE OF ACTION UNDER § 1981 25

A. McDonald Was Not A Party To The Relevant Contracts 25

B. Respondent's Allegation Of Individual Injuries Does Not Create Standing 28

C. McDonald Has Not Alleged Any Viable Third-Party Interference Claim, And Could Not 31

IV. ALLOWING MCDONALD TO SUE FOR THESE INJURIES WOULD UPSET THE BALANCE OF THE CIVIL RIGHTS LAWS 35

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

CASES

Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517 (1991) 12

Alexander v. Sandoval, 532 U.S. 275 (2001) 11, 35

Allen v. Wright, 468 U.S. 737 (1984) 13

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 21, 38

Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) 11, 12

Bank of Augusta v. Earle, 38 U.S. 519 (1839) 26

Bellows v. Amoco Oil Co., 118 F.3d 268 (5th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998) 23, 24, 30, 32, 33

Bennett v. Spear, 520 U.S. 154 (1997) 12, 13

Bermudez v. TRC Holdings, Inc., 138 F.3d 1176 (7th Cir. 1998) 37

Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Boston Stock Exchange v. State Tax Commission,
429 U.S. 318 (1977) 12

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 34

Burnett v. Grattan,
468 U.S. 42 (1984) 17, 38

Civil Rights Cases,
109 U.S. 3 (1883) 16

Clarke v. Securities Industry Ass'n,
479 U.S. 388 (1987) 12

Consolidated Rail Corp. v. Gotshall,
512 U.S. 532 (1994) 36

Cort v. Ash,
422 U.S. 66 (1975) 35

Danco, Inc. v. Wal-Mart Stores, Inc.,
178 F.3d 8 (1st Cir. 1999), *cert. denied*, 528 U.S.
1105 (2000) 23, 26, 39

Davis v. Passman,
442 U.S. 228 (1979) 10

Erlich v. Glasner,
418 F.2d 226 (9th Cir. 1969) 7, 31

Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.,
28 F.3d 1268 (D.C. Cir. 1994) 24, 25

TABLE OF AUTHORITIES—Continued

Page(s)

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 35

Foster v. MCI Telecommunications. Corp.,
773 F.2d 1116 (10th Cir. 1985) 19

General Building Contractors Ass'n v. Pennsylvania,
458 U.S. 375 (1982) 15, 16, 17, 18, 32

Georgia v. Rachel,
384 U.S. 780 (1966) 14

Gersman v. Group Health Ass'n,
931 F.2d 1565 (D.C. Cir. 1991) 39

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 13

Gomez v. Alexian Brothers Hospital,
698 F.2d 1019 (9th Cir. 1983) 6, 7

Grubb v. W.A. Foote Memorial Hospital Inc.,
533 F. Supp. 671 (E.D. Mich. 1981), *aff'd*, 759
F.2d 546 (6th Cir. 1985) 19

Guides, Ltd. v. Yarmouth Group Property Management, Inc.,
295 F.3d 1065 (10th Cir. 2002) 22, 23, 30, 39

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 34, 37

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Hernandez v. Hill Country Telephone Cooperative, Inc.,
849 F.2d 139 (5th Cir. 1988) 19

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) 21, 30, 38

Hudson Valley Freedom Theater, Inc. v. Heimbach,
671 F.2d 702 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982) 39

Hunter v. Allis-Chalmers Corp.,
797 F.2d 1417 (7th Cir. 1986) 19

J. I. Case Co. v. Borak,
377 U.S. 426 (1964) 11

Johnson v. Railway Express Agency,
421 U.S. 454 (1975) 16, 34

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 16

Jordan v. State ex rel. Department of Motor Vehicles & Public Safety,
110 P.3d 30 (Nev. 2005) 36

Kaplan v. First Options of Chicago, Inc. (In re Kaplan),
143 F.3d 807 (3d Cir. 1998) 27

Kramer v. Western Pacific Industries, Inc.,
546 A.2d 348 (Del. 1988) 29

Kyles v. J.K. Guardian Security Services, Inc.,
222 F.3d 289 (7th Cir. 2000) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 2

Liotta v. National Forge Co.,
629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) 19

Lipshie v. Tracy Investment Co.,
566 P.2d 819 (Nev. 1977) 28

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 9, 28

Marymont v. Nevada State Banking Board,
111 P. 295 (Nev. 1910) 26

Metrocare v. Washington Metropolitan Area Transit Authority,
679 F.2d 922 (D.C. Cir. 1982) 19

National Railroad Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 34

Patterson v. America Tobacco Co.,
535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) 19

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 18

Richards v. New York City Board of Education,
668 F. Supp. 259 (S.D.N.Y. 1987), *aff'd without op.*, 842 F.2d 1288 (2d Cir. 1988) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 20

Rowlett v. Anheuser-Busch, Inc.,
832 F.2d 194 (1st Cir. 1987) 19

Runyon v. McCrary,
427 U.S. 160 (1976) 17

Satterwhite v. Smith,
744 F.2d 1380 (9th Cir. 1984) 19

Searcy v. Houston Lighting & Power Co.,
907 F.2d 562 (5th Cir. 1990), *cert. denied*, 498
U.S. 970 (1990) 23, 26

Sherman v. British Leyland Motors, Ltd.,
601 F.2d 429 (9th Cir. 1979) 28

Sierra Club v. Morton,
405 U.S. 727 (1972) 10

Singleton v. Wulff,
428 U.S. 106 (1976) 12, 39

Slaughter-House Cases,
83 U.S. 36 (1873) 16

Stallworth v. Shuler,
777 F.2d 1431 (11th Cir. 1985) 19

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 10

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 31

TABLE OF AUTHORITIES—Continued

Page(s)

Sulmeyer v. Sycamore Investment Co. (In re Aslan),
909 F.2d 367 (9th Cir. 1990) 3

Taylor v. Jones,
653 F.2d 1193 (8th Cir. 1981) 19

Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.,
368 F.3d 1053 (9th Cir. 2004) 39

Tillman v. Wheaton-Haven Recreation Ass'n,
410 U.S. 431 (1973) 15, 16

United States v. Texas,
507 U.S. 529 (1993) 21

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 15

Wallace ex rel. Cencom Cable Income Partners II v. Wood,
752 A.2d 1175 (Del. Ch. 1999) 27

Warth v. Seldin,
422 U.S. 490 (1975) ..... *passim*

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 16

STATUTES AND REGULATIONS

14 Stat. 27 (1866) 15

5 U.S.C. § 702 12

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1981(a) 14
42 U.S.C. § 1981(b) 14, 19, 33
42 U.S.C. § 1981(c) 14

42 U.S.C. § 1982 15

42 U.S.C. § 2000e-2(a)(1) 34

LEGISLATIVE HISTORY

Cong. Globe, 39th Cong., 1st Sess. (1866) 15, 16

H.R. Rep. No. 101-644, pt. 1 (1990) 19

S. Rep. No. 101-315 (1990) 18, 19

OTHER AUTHORITY

1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 29 (perm. ed., rev. vol. 1999) 26

2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 (perm. ed., rev. vol. 1998) 32

12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5908, § 5911, (perm. ed., rev. vol. 2000) 31

Restatement (Second) of Contracts § 353 (1981) 36

Restatement (Second) of Torts § 766 (1977) 33

TABLE OF AUTHORITIES—Continued

Page(s)

Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (2d ed. 1985) 10

George Rutherglen, *The Improbable History Of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303 16

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Pet. App. 1-2) is unpublished. The order of the U.S. District Court for the District of Nevada granting Petitioners' motion to dismiss (Pet. App. 3-7) is unpublished.

JURISDICTION

The Ninth Circuit denied Petitioners' motion for rehearing on August 2, 2004. Pet. App. 8. The petition for a writ of certiorari was filed on November 1, 2004 and was granted on April 25, 2005. 125 S. Ct. 1928. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1981 provides:

§ 1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

Petitioners Domino's Pizza, LLC and Domino's Pizza, Inc. ("Domino's") had contracts with non-party JWM Investments, Inc. ("JWM"), under which JWM agreed to build restaurants and lease them to Domino's. Respondent John McDonald is the president and sole shareholder of JWM. After Domino's terminated its contracts with JWM, McDonald sued Domino's *in his individual capacity*. He relied on 42 U.S.C. § 1981, which guarantees to every person the right "to make and enforce contracts" free from racial discrimination, even though he was not personally a party to any contract with Domino's.

The Ninth Circuit held that this lawsuit could proceed because McDonald alleges "individual" injuries such as emotional distress. But an allegation of injury alone is not enough. When a plaintiff sues pursuant to a federal statute, he must also demonstrate that the statute grants persons in his position a right to judicial relief. The Ninth Circuit completely failed to analyze whether McDonald has statutory standing to sue, or for that matter whether he has any federal cause of action. The Ninth Circuit's holding conflicts with every other court that has confronted this issue under § 1981, and threatens to unleash a flood of litigation by plaintiffs who have suffered no injury to the right—to "make and enforce contracts"—that § 1981 actually protects. This Court should reverse the judgment below and direct that the case be dismissed.

Respondent's Allegations

Because the district court granted Domino's motion to dismiss, the following summary assumes that the allegations in McDonald's complaint are true. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

Domino's and JWM signed four contracts. Pet. App. 11. JWM agreed to acquire real estate, construct four Domino's

restaurants, and then lease the restaurants to Domino's. The only parties to the contracts were Domino's and JWM. McDonald acknowledges that his role with respect to the contracts was solely as agent for JWM. *See* Pet. App. 11 ("McDONALD in his capacity as President of JWM Investments"); Pet. App. 15 ("McDONALD acting for JWM").

The first restaurant was allegedly completed within the timeframe specified in the contracts. The second encountered a variety of problems, including difficulties with city zoning. These problems led to delays in construction, and the relationship between JWM and Domino's "soured." Pet. App. 12.

According to McDonald, the contracts between JWM and Domino's stated that Domino's would execute "estoppel certificates" for JWM if necessary for financing and/or sale purposes.[1] McDonald alleges that Domino's employee Deborah Pear Phillips ("Phillips") refused to sign such requests by JWM. McDonald also alleges that Phillips called the Las Vegas Valley Water District and removed JWM's name as landowner, requiring him to go in person to prove ownership. Pet. App. 12; *see also* Brief in Opposition to Certiorari at 2 (clarifying that the property was titled in JWM's name, not McDonald's).

McDonald and Phillips then had a telephone conversation in which they discussed the problems that had arisen. Pet. App. 12. McDonald claims that he expressed an intention to complete the projects, but that Phillips told him she would see to it that he would experience financial

---

[1] An "estoppel certificate" is a tenant's written description of its interest in property, which enables prospective mortgagees or purchasers to evaluate the nature and extent of the tenant's interests. *See, e.g., Sulmeyer v. Sycamore Inv. Co. (In re Aslan)*, 909 F.2d 367, 369 n.2 (9th Cir. 1990) ("A certificate of estoppel is a tenant's warranty as to the terms of a lease, and thus would enable [the purchaser of the property] to estimate the cost of ousting or keeping a tenant.").

repercussions if he continued. Phillips allegedly told McDonald that "I don't like dealing with you people anyway." Pet. App. 12-13. She also allegedly stated that she would see to it that Domino's did no further business with McDonald. Pet. App. 13.

From that point on, McDonald's calls to Domino's were forwarded to Joel Graziani in the general counsel's office. Graziani told McDonald that, notwithstanding Phillips's alleged comments, Domino's was prepared to sign the estoppel certificates and move forward with the projects, but only if the lease contracts were amended. Pet. App. 13. The contracts were not amended, and the relationship between Domino's and JWM deteriorated until Domino's ultimately terminated the contracts. Although Domino's adamantly denies the charge, McDonald alleges that Domino's decision to terminate its contracts with JWM was motivated by racial discrimination because McDonald is African-American. Pet. App. 14, 16. He also alleges that JWM had various financial difficulties after the termination of the JWM-Domino's contracts, leading to JWM's eventual bankruptcy. Pet. App. 13-14.

As McDonald acknowledged in his briefs to the Ninth Circuit, JWM brought *its own* claim against Domino's arising from this contract dispute during JWM's Chapter 11 bankruptcy proceedings in 2001. Plaintiff-Appellant's Opening Brief in the Court of Appeals at 4; *see also* Stipulation Settling Adversary Proceeding in *In re JWM Investments, Inc.*, Case No. 00-19303-LBR11 (Bankr. S.D. Nev.), attached as a supplement to Plaintiff's Opposition to Motion to Dismiss, at Defendants-Appellees' Excerpts of Record 29-32. Domino's settled that claim for $45,000 in exchange for a complete release from JWM, and the bankruptcy court accepted the settlement. *Id.*

After settling the claim brought on behalf of JWM, McDonald filed this lawsuit against Domino's in his

individual capacity. His complaint alleges a violation of 42 U.S.C. § 1981, which protects the right "to make and enforce contracts" free from discrimination. His complaint does not describe any contract to which he was a party, or any contractual right or interest *personal to him* that he believes was injured. The complaint repeatedly acknowledges, for example, that the only contracts at issue were between JWM and Domino's. *See* Pet. App. 12 ("The contracts between JWM and Domino's stated ...."); Pet. App. 14 ("the contract with JWM"); *id.* (Domino's employees acted "to breach the contracts between JWM and DOMINO'S"). Up to and including his briefs to the Ninth Circuit, McDonald's sole theory of relief has been that he should be permitted to recover for "individual" injuries that he allegedly suffered incident to the termination of the JWM-Domino's contract. Specifically, he alleges that he suffered "pain and suffering, emotional distress, and humiliation." Pet. App. 16. Although his complaint cursorily lists "front pay" as an item of damages, Pet. App. 17, he has never claimed that he was employed by JWM or that JWM paid him a salary.

The District Court's Dismissal

Domino's moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) on the ground that McDonald lacked statutory standing to sue. Domino's argued that 42 U.S.C. § 1981 protects the contractual relationship and, since McDonald was not a party to the contracts at issue, his allegations of injury were not covered by the statute.

The district court agreed, holding that "[b]y its terms, section 1981 protects the contractual relationship itself and therefore limits the class of persons who may sue under section 1981 to persons in the contractual relationship." Pet. App. 5. The court further held that while JWM might have a claim under § 1981, "a president or sole shareholder may

not step into the shoes of the corporation and assert that claim personally." Pet App. 7. The court granted the motion and dismissed the complaint with prejudice. *Id.*

Proceedings On Appeal

The Ninth Circuit reversed in an unpublished summary order. Pet. App. 1-2. The court ruled that it was bound to follow a prior Ninth Circuit case, *Gomez v. Alexian Brothers Hospital*, 698 F.2d 1019 (9th Cir. 1983). Because the Ninth Circuit's opinion in this case simply defers to *Gomez* as controlling circuit precedent, Petitioners will summarize that case briefly.

In *Gomez*, an Hispanic physician who practiced medicine as an employee of a professional corporation brought suit when the defendant hospital rejected the corporation's contract to operate its emergency room for allegedly racial reasons. After the district court dismissed the physician's complaint for lack of statutory standing, the court of appeals reversed. Analyzing the physician's claim under Title VII, the court first ruled that he had alleged sufficient injury-in-fact, because he had alleged injuries that were distinct from that of the corporation, including loss of employment, and "humiliation and embarrassment." 698 F.2d at 1021. The court noted that "[t]he same discriminating conduct can result in both corporate and individual injuries." *Id.* The court also held that the plaintiff had stated a claim under Title VII. By declining his corporation's offer, the hospital had injured the plaintiff's employment relationship with his own corporation, because "[t]he conditions of plaintiff's employment are different than they would have been had he not been discriminated against." *Id.* Although the *Gomez* court's entire analysis focused on Title VII, the court reasoned that "[t]he same is true of plaintiff's claim under §§ 1981 and 1985(3). 'The guarantees of § 1981 and Title VII against racial discrimination are coextensive.'" *Id.* at 1022 (citation omitted).

The Ninth Circuit held in this case that *Gomez* compelled it to permit McDonald's claim to proceed. It noted that "[w]hile a shareholder cannot maintain a civil rights action for injury suffered only by the corporation, *see Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969), we have acknowledged that '[t]he same discriminatory conduct can result in both corporate and individual injuries.'" Pet. App. 1-2 (quoting *Gomez*, 698 F.2d at 1021 (alteration in original)). The court then held that although its "sister circuits may reach a contrary result," nevertheless "*Gomez* squarely controls this case. While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc." Pet. App. 2.

SUMMARY OF ARGUMENT

42 U.S.C. § 1981 is the present codification of our Nation's oldest civil rights statute, the Civil Rights Act of 1866. It guarantees to every person "the same right ... to make and enforce contracts ... as is enjoyed by white citizens." But plaintiff John McDonald does not claim that his own right "to make and enforce contracts" was denied or infringed in any way. He alleges no contract to which he was personally a party, or wished to be. The gravamen of McDonald's complaint is, instead, that he suffered various "individual" emotional injuries when Domino's terminated a contract *with JWM* for allegedly discriminatory reasons.

The Ninth Circuit apparently believed that anyone can bring suit if they can allege a discrete, "individual" injury causally traceable to a violation of a federal statute. That is incorrect. A distinct injury fairly traceable to the defendant's conduct is the constitutional minimum for standing; it establishes that Congress *could* grant a person in plaintiff's position a right to judicial relief. But whether Congress *did* grant this plaintiff a right to judicial relief is

ultimately a question of statutory interpretation. And in the absence of some clear expression of congressional intent to the contrary, this Court always presumes that plaintiffs cannot assert the rights of third parties, and that they must be within the "zone of interests" protected by the statute in order to sue.

McDonald lacks "statutory standing" to sue (or, put more simply, any federal cause of action) under § 1981. That statute grants a powerful but specific set of rights—*inter alia*, a right to "make and enforce contracts" free from racial discrimination. It does not guarantee a right to be free from the collateral consequences of racial discrimination in the contractual relationships of third parties. In *Warth v. Seldin*, 422 U.S. 490 (1975), this Court held that taxpayers in the city of Rochester lacked standing under § 1981 to claim that their own taxes were higher because exclusionary zoning in a neighboring municipality denied low-income persons the ability to "make ... contracts" for housing there. McDonald is similarly "asserting the rights or legal interests of others in order to obtain relief from injury to [himself]," 422 U.S. at 509, and therefore his claim must also be dismissed.

To the extent McDonald's claim has any superficial appeal, it arises solely from the fact that the third party whose § 1981 rights were allegedly violated in this case happens to be his own, wholly-owned corporation. But doing business through the corporate form, and thereby insulating himself from any personal contractual relationships that could have supported a claim under § 1981, was entirely McDonald's choice. And there is no coherent distinction between large corporations and small ones in this context. If McDonald's claim is permitted, then every shareholder, employee, or bystander who can claim to have suffered "individual" damages, including emotional distress, traceable to an allegedly discriminatory breach of

contract between IBM and General Motors will have standing to sue. That would be a radical and profoundly disruptive innovation.

The Ninth Circuit's decision should be reversed, and the district court's dismissal of this lawsuit should be reinstated.

ARGUMENT

I. A DISCRETE "INDIVIDUAL" INJURY DOES NOT CREATE STATUTORY STANDING OR A FEDERAL CAUSE OF ACTION

The Ninth Circuit believed that McDonald could pursue a claim because he had alleged "individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc." Pet. App. 2. That holding misunderstands the nature of the statutory standing inquiry, and ignores the plain language of § 1981.

"[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Id.*

The constitutional limits on standing flow from Article III's case or controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing requires that: (1) the plaintiff have suffered an injury in fact that is both concrete and particularized, and actual or imminent; (2) the injury be fairly traceable to the acts of the defendant; and (3) it is likely, as opposed to conjectural, that the injury will be resolved by a favorable decision. *Id.* If a plaintiff does not satisfy that test, then Congress *cannot* grant them any federal cause of action—because deciding the case would force the federal courts to exceed their constitutional power. It is undisputed that McDonald could have standing under Article III. Accepting his allegations as true, he claims concrete injuries that were allegedly

caused by Domino's termination of the JWM contracts, and those injuries would be redressed by the monetary damages he seeks.

But the presence of Article III standing establishes only that Congress *could* grant McDonald a right to judicial relief in these circumstances; it does not establish that such relief is, in fact, available. A plaintiff suing under a federal statute must also demonstrate that the statute grants "statutory" or "prudential" standing. That is a question of statutory interpretation. "[W]hether the litigant is a 'proper party to request an adjudication of a particular issue' is one within the power of Congress to determine." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citation omitted). Because "[s]tatutory rights and obligations are established by Congress, ... it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979).

The "statutory standing" inquiry is therefore deeply intertwined with whether the statute grants the plaintiff a cause of action at all. As this Court recently explained, "[t]he question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998).[2] This Court's modern "right of

[2] *See also Steel Co.*, 523 U.S. at 117-18 (Stevens, J., concurring in the judgment) ("[I]t is also possible to characterize the [statutory standing] issue in this case as whether respondent's complaint states a 'cause of action.'"); *Davis*, 442 U.S. at 239 n.18 (noting that "*cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court"); Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 1094 (2d ed. 1985) ("When a plaintiff seeks standing on the basis that an interest is protected by statute, the question whether that interest is legally protected for standing purposes is the same as the question whether plaintiff (assuming his or her factual allegations are true) has a claim on the merits.").

action" cases recognize that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).[3] Like the "statutory standing" analysis, that inquiry ultimately reduces to whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

This Court does not, however, approach that interpretive task from a blank slate in every case. It has recognized several "prudential" presumptions about when Congress intends to grant statutory standing to sue, including a presumption that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," *Warth*, 422 U.S. at 499, and a presumption that a plaintiff will not have standing to sue unless his complaint falls within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

The presumption that a plaintiff cannot ordinarily assert the legal rights of third parties serves two principal purposes. "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders

[3] This Court has repudiated its prior expansive approach to implying federal causes of action, under which the courts had been "'alert to provide such remedies as are necessary to make effective the congressional purpose.'" *Sandoval*, 532 U.S. at 287 (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). And second, because "third parties themselves usually will be the best proponents of their own rights," both the courts and those third parties generally prefer for legal rights to be construed only "when the most effective advocates of those rights are before [the court]." *Id.* at 114. The "zone of interests" test serves similar purposes by ensuring that statutory rights or duties are enforced by the plaintiffs that the statute was intended to protect.[4] Those rules combine to produce the principle that

[4] Most of this Court's "zone of interest" cases have been decided in the administrative law context, where the Administrative Procedure Act grants standing to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Against the backdrop of the APA's "generous review provisions," *Camp*, 397 U.S. at 156, this Court has frequently stated that a plaintiff has standing to challenge agency action so long as he or she is "*arguably* within the zone of interests to be protected or regulated by the statute," *id.* at 153 (emphasis added). That standard is certainly generous to potential plaintiffs, although by no means a free pass. *See, e.g., Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517 (1991) (holding that Postal employees are not within the "zone of interests" protected by the statutes giving the U.S. Postal Service a monopoly over mail carriage in the context of an APA challenge); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984) (milk producers lack standing to challenge certain milk pricing orders by the Secretary of Agriculture). This Court has chosen to apply a similarly expansive analysis in cases where the cause of action arises directly under the Constitution, pursuant to its authority to interpret the constitutional text. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (Commerce Clause). But this Court has recognized that the "arguably within the zone of interests" gloss does not apply to statutes outside of the administrative law context. "[W]hat comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (citation omitted); *see also, e.g., Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987); Br. *Amicus Curiae* States at 5-10. Absent a separate extraordinary review provision like § 702 of the APA, the question is always whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

plaintiffs asserting some collateral injury caused by a violation of some *other* party's statutory rights generally lack standing.[5] *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

Congress can, if it chooses, override these presumptions and expand standing out to the furthest limits permitted by Article III. Indeed, Congress knows exactly how to specify that result when it wishes. In *Bennett v. Spear*, 520 U.S. 154 (1997), for example, this Court held that the Endangered Species Act provision establishing that "any person may commence a civil suit" demonstrated a clear intent to permit enforcement by any injured citizen, even if the plaintiff did not suffer injuries to statutorily created rights. 520 U.S. at 164-65; *see also Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (Fair Housing Act). In the absence of such language, however, this Court presumes that Congress did not intend to deviate from the well-settled prudential limitations on statutory standing.

The Ninth Circuit's conclusion that McDonald suffered a "separate and distinct ... individual injury," Pet. App. 2, is therefore wholly insufficient to establish statutory standing or the existence of a cause of action. In addition to a discrete personal injury, McDonald must also establish that Congress intended to grant a person in his position a right to recover under § 1981—which (in the absence of statutory language expanding the usual standing rules) requires him to show that he is within the zone of interests protected by

[5] Although in the circumstances of this case McDonald's interests may be congruent with JWM's, this Court could not adopt one interpretation of § 1981 for single-shareholder corporations and another interpretation for all other contexts. There is no principled basis for treating shareholders of small corporations differently from shareholders of large ones.

the statute, and that he is asserting his own statutory rights rather than the rights of a third party.

II. SECTION 1981 DOES NOT AUTHORIZE SUIT BY PERSONS WHO HAVE NOT BEEN DENIED THE RIGHT TO "MAKE AND ENFORCE CONTRACTS"

The text, history, and consistent judicial interpretation of § 1981 make clear that it protects only the right to "make and enforce contracts" free from racial discrimination—and that the only persons with standing to sue under § 1981 are those who have actually suffered some injury to that right.

A. Section 1981 Protects Only A Specific, Personal Right To "Make And Enforce Contracts" Free From Discrimination

The text of 42 U.S.C. § 1981(a) provides that "[a]ll persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens." The right to "make and enforce contracts" is defined, in turn, to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The plain language makes clear that the statute grants to every person the right to be free from racial discrimination in their own actual or prospective contractual relationships. The statute by its terms only provides redress for the discriminatory impairment of "[t]he rights protected by this section." 42 U.S.C. § 1981(c). It does not grant a cause of action for all injuries caused by discrimination in the contractual relationships of others.

The legislative history and consistent judicial interpretation confirm that conclusion. "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). The language of the statute traces its

origin to § 1 of the Civil Rights Act of 1866 ("the 1866 Act") ch. 31, 14 Stat. 27, which was enacted shortly after the ratification of the 13th Amendment.[6] *See, e.g., Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982). The language of the 1866 Act was re-codified in virtually identical form as part of the Enforcement Act of 1870,[7] and is now 42 U.S.C. § 1981(a).

"The principal object of the [1866 Act] was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *Gen. Bldg.*, 458 U.S. at 386; *see also* Cong. Globe, 39th Cong., 1st Sess. 474 (1866). The paradigm concern of the 1866 Act thus was the abolition of state-created restrictions on "the right to make and enforce contracts." Cong. Globe at 476. Notably, Congress removed a broad opening declaration to

---

[6] Section 1 of the 1886 Act read in part: "That all persons born in the United States and not subject to any foreign power, ... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

[7] The text of the Enforcement Act differed slightly in two respects. First, while the 1866 Act applied to "citizens, of every race and color," the 1870 Act—and § 1981—protects "all persons." *See Gen. Bldg.*, 458 U.S. at 385; *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898). Second, the Enforcement Act omitted language from the 1866 Act regarding property rights that was later codified at 42 U.S.C. § 1982. "Thus, '[although] the 1866 Act rested only on the Thirteenth Amendment ... and, indeed, was enacted before the Fourteenth Amendment was formally proposed, ... the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment.'" *Gen. Bldg.*, 458 U.S. at 386 (quoting *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 n.11 (1973)) (alterations in original).

the 1866 Act that would have stated that "there shall be no discrimination in civil rights or immunities among citizens ... on account of race, color, or previous condition of slavery." *Id.* at 1366. Out of concern that this language could be interpreted as encompassing a broader spectrum of rights, the language was deleted. *See id.* at 1367 ("To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section."). As this Court has recognized, the removal of that passage "sharply undercuts the view that the 1866 Act reflects broader concerns" than the specific rights identified in its text. *Gen. Bldg.*, 458 U.S. at 388 n.15.

For the first century after its enactment, this Court apparently assumed that the substantive scope of § 1981 was limited to state action prohibited by the Fourteenth Amendment.[8] Several decades ago this Court recognized that § 1981 applies to private discrimination as well as to state action.[9] But it has nonetheless consistently described § 1981 as limited to interference (public or private) with the specific right to "make and enforce contracts." And in every case in which this Court has examined the scope of § 1981,

---

[8] *See* George Rutherglen, *The Improbable History Of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303; *Slaughter-House Cases*, 83 U.S. 36, 70 (1873); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). That assumption flowed from this Court's holding in the *Civil Rights Cases*, 109 U.S. 3 (1883), that the public accommodations provisions of the Civil Rights Act of 1875 were unconstitutional as applied to private discrimination.

[9] In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court held that § 1982, the companion statute to § 1981, protected against purely private discrimination in the sale or lease of property. Shortly thereafter, *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), held that both § 1981 and § 1982 applied to membership in a private, residential swimming pool.

the plaintiff was in a contractual relationship and alleged violation of a right to make or enforce a contract.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), a railroad employee sued his employer and his union alleging that the railroad's seniority rules and job assignments were tainted by racial discrimination, and that the union maintained racially segregated membership. He alleged that these policies had injured his employment and union contracts in violation of § 1981 and Title VII. The plaintiff in *Johnson* fell squarely within the plain terms of § 1981, because he sued to "enforce" his employment contract with his employer and his contract with his union. And this Court recognized that the statute "on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Id.* at 459.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), the plaintiffs were a group of children who sued a private school for discriminating against African-American applicants. The plaintiffs alleged a straightforward violation of their own right to "make" contracts with the school, and this Court noted that § 1981 forbids only interference with the specific "rights enumerated" in the text of the statute. *Id.* at 170-71; *see also, e.g., Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984) ("Title 42 U. S. C. § 1981 guarantees the right to be free from racial discrimination in specific activities, such as making contracts and bringing suit.").

In *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), this Court again clarified that § 1981 creates only a narrow, specifically defined cause of action. The plaintiffs in *General Building Contractors* argued that liability could be imposed against construction trade associations for the discrimination of a union to which the associations had delegated the authority to hire workers through a hiring hall. This Court held that the trade associations were not liable under § 1981 because they had

not violated or interfered with anyone's right to "make and enforce contracts" free from racial discrimination. This Court explained that § 1981 did not create any duty to ensure that *others* do not discriminate in their contractual relationships. 458 U.S. at 395-96.

This Court's most extensive discussion of § 1981's scope came in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). The plaintiff in *Patterson* was an employee who alleged that she suffered harassment, was not promoted, and was ultimately terminated from her job because of her race. Accepting those allegations as true, this Court nonetheless held that the conduct she complained of did not "fall[] within one of the enumerated rights protected by § 1981." 491 U.S. at 176. It emphasized that "[t]he most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. *Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief.*" *Id.* (alterations in original) (emphasis added). This Court then held that the right to "make" contracts protects only the formation of contracts, and that the right to "enforce" contracts guarantees nothing more than access to the courts. *Id.* at 176-77. Thus Ms. Patterson's racial harassment and termination claims were not cognizable under § 1981 because such post-formation conduct did not involve either a refusal to make a contract with her or the denial of her ability to enforce her contract rights by judicial process. *Id.* at 177-78.

Shortly after the Court issued its opinion in *Patterson*, Congress altered the meaning of "make and enforce" in the Civil Rights Act of 1991 by adding the current § 1981(b) definition. *See* S. Rep. No. 101-315, at 6 (1990). The right to "make and enforce contracts" free from racial discrimination now includes all aspects of the contractual relationship,

including post-formation contractual performance and termination. But the language Congress chose makes it clear that § 1981 is still limited to "the making, performance, modification, and termination *of contracts*," and protects the "benefits, privileges, terms, and conditions *of the contractual relationship*." 42 U.S.C. § 1981(b) (emphasis added).

Nor does anything in the legislative history of the 1991 Act suggest an intent to expand § 1981 beyond the contractual relationship and contract rights. The House Committee Report stated that it was simply codifying what it believed was the pre-*Patterson* view within the lower federal courts concerning the scope of § 1981: "Prior to the *Patterson* ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination during the performance of that contract as well." H.R. Rep. No. 101-644, pt. 1, at 17 (1990).[10] Likewise, the Senate Committee Report consistently focuses on contracts: *E.g.*, "The Committee finds that there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination *in contracts*." S. Rep. No. 101-315, at 14 (emphasis added).

---

[10] *See, e.g., Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987); *Richards v. N.Y. City Bd. of Educ.*, 668 F. Supp. 259 (S.D.N.Y. 1987), *aff'd without op.*, 842 F.2d 1288 (2d Cir. 1988); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903 (3d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Hernandez v. Hill Country Tel. Coop., Inc.*, 849 F.2d 139 (5th Cir. 1988); *Grubb v. W.A. Foote Mem'l Hosp. Inc.*, 533 F. Supp. 671 (E.D. Mich. 1981), *aff'd*, 759 F.2d 546 (6th Cir. 1985); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Satterwhite v. Smith*, 744 F.2d 1380 (9th Cir. 1984); *Foster v. MCI Telecomms. Corp.*, 773 F.2d 1116 (10th Cir. 1985); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985); *Metrocare v. Wash. Metro. Area Transit Auth.*, 679 F.2d 922 (D.C. Cir. 1982).

Indeed, this Court has already recognized that the scope of § 1981 remains limited to contractual rights and the contractual relationship. In *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994), the Court observed that the 1991 legislation "amended § 1981 to embrace all aspects *of the contractual relationship*, including contract terminations, [and thus] it enlarged the category of conduct that is subject to § 1981 liability." (Emphasis added.)

B. Section 1981 Does Not Grant Third-Party Standing To Persons Whose Own Right To "Make And Enforce Contracts" Has Not Been Violated

It is, therefore, well settled that § 1981 protects only an individual right to "make and enforce contracts" free from racial discrimination. The "zone of interests" protected by § 1981 is that right, nothing more and nothing less. And nothing in the statute suggests any intent by Congress to abrogate the ordinary prudential standing rules and permit suit by persons whose own right to "make and enforce contracts" has not been violated, merely because they have suffered some discrete injury traceable to the violation of *someone else's* rights under § 1981. Section 1981 does not contain any review provision comparable to the APA or the Endangered Species Act, that would authorize suit by "any person" harmed by a violation of its provisions. It grants a set of specific, personal rights—and grants statutory standing (or, put differently, a cause of action) only to persons who have suffered an injury *to those rights*.

Even if the text were unclear, there would be no reason to infer that the 1866 Congress intended to create a cause of action for derivative injuries. The nineteenth century common law drew a strong distinction between direct and derivative injuries, and the latter were not recoverable on proximate cause grounds. "Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a

third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992); *see also, e.g., Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532 n.25 (1983) ("'*[Where] the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote*, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract ....'") (quoting 1 Jabez G. Sutherland, *Law of Damages* 55-56 (1882)).

This Court has consistently applied the canon that statutes "'are to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted). In *Associated General Contractors* this Court "consider[ed] the contemporary legal context in which Congress acted" and held that the Clayton Act incorporated the common law prohibition on derivative injuries—even though the literal language of the Clayton Act authorized suit by any person "injured in his business or property by reason of anything forbidden in the antitrust laws." 459 U.S. at 529-32. If that language was not sufficient to demonstrate congressional intent to abandon traditional proximate cause principles, then certainly the text of § 1981 is not. Section 1981 on its face authorizes suit only by persons whose own right to "make and enforce contracts" has been violated.

Indeed, this Court squarely held in *Warth v. Seldin* that § 1981 does not create standing to sue for collateral or derivative injuries traceable to the violation of some other

party's rights to "make and enforce contracts." In *Warth*, a variety of plaintiffs alleged violations of their constitutional and statutory rights, including under § 1981, arising from zoning laws in the town of Penfield, New York that allegedly operated to exclude persons of low and moderate income from living in the town. Among the plaintiffs was a group of taxpayers from the neighboring city of Rochester, who alleged that their taxes were higher because of the exclusionary zoning in Penfield. This Court noted that those taxpayer plaintiffs could not "assert any *personal* right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester." *Warth*, 422 U.S. at 509 (emphasis added). As a result, "the only basis of the taxpayer-petitioners' claim is that Penfield's zoning ordinance and practices violate the constitutional and statutory rights of third parties," namely the low-income persons excluded from Penfield. *Id.* This Court held that the taxpayers' claims fell "squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Id.* And while Congress might abrogate that limitation by statute, "no statute expressly or by clear implication grants a right of action, and thus standing to seek relief, to persons in [their] position," including 42 U.S.C. § 1981. *Id.* at 510.

Consistent with that guidance, the First, Fifth, and Tenth Circuits have squarely held that the owner of a corporation—exactly like McDonald—cannot bring suit under § 1981 for "individual" injuries suffered in connection with a violation of the *corporation's* right to make and enforce contracts. In *Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir. 2002), the plaintiff's wholly-owned corporation did business as a retail store called the Africa House. The plaintiff brought a

claim individually and on behalf of her corporation under § 1981 alleging that the defendant shopping mall evicted the store because of her race. The Tenth Circuit affirmed the dismissal of her individual claim on the ground that she lacked standing under § 1981, because "the party seeking to contract with the defendants and to lease property, and thus the direct victim of the alleged discrimination, was [plaintiff's] corporation, Africa House, rather than [plaintiff] herself." *Id.* at 1072. The court held that she could not bring a claim for emotional distress because "her claim is derivative of that of Africa House." *Id.* at 1072-73.

In *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000), the First Circuit similarly upheld the dismissal of a president and sole shareholder's individual § 1981 claim because he was not a party to the relevant contract. The plaintiff was the owner of a corporation that contracted to maintain a parking lot for Wal-Mart. He brought a § 1981 claim alleging that Wal-Mart had created a racially hostile work environment. The First Circuit recognized that the corporation could bring a claim under § 1981, but held that the president and sole shareholder could not. "The same statutory language that gives a claim to Danco, as an independent contractor with Wal-Mart, precludes such a claim by [Danco's owner] unless he also had a contract with Wal-Mart. ... Nothing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely affiliated—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract." *Id.* at 14.

The Fifth Circuit likewise has twice ruled that the president/owner of a corporation has no individual cause of action under § 1981 arising from alleged discrimination against the corporation. *Bellows v. Amoco Oil Co.*, 118 F.3d 268 (5th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir.

1990), *cert. denied*, 498 U.S. 970 (1990). The *Bellows* court held that the owner's individual claim failed because his allegations only implicated his corporation's right to contract, and not his own. 118 F.3d at 276-77. The court relied on *Searcy*, which had denied standing to the president and founder of a corporation on the ground that the "discrimination alleged by Searcy can be asserted to invade the legal rights of [his corporation] only." 907 F.2d at 565.

Several circuits have also held that employment "testers," who pretend to seek employment to collect information about discriminatory hiring practices, lack standing to bring a claim under § 1981. Those courts have held that because testers do not have a genuine interest in employment themselves, they suffer no injury to their personal right to "make or enforce contracts" and thus fall outside the scope of § 1981—even though they undoubtedly suffer discrete, individual injuries (principally emotional distress and humiliation). As the Seventh Circuit put it, § 1981 "protects the right to enter into and preserve a contractual relationship, period. ... The class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship." *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000); *see also id.* at 302 (although plaintiffs alleged humiliation and emotional distress, "in terms of the essential right that section 1981 protects—the right to make and enforce a contract—[plaintiffs] suffered no injury"). And in *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1270-72 (D.C. Cir. 1994), the D.C. Circuit also held that employment testers do not suffer any injury cognizable under § 1981.[11]

---

[11] The D.C. Circuit emphasized that its holding was entirely consistent with *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which this Court upheld tester standing under the Fair Housing Act, because the broader language of the Fair Housing Act explicitly conferred a cause of action. 28 F.3d at 1271-72.

The consensus view among the other courts of appeals is clearly correct. Section 1981 authorizes suit only by persons whose own right to "make and enforce contracts" has been infringed. It does not authorize suit for injuries caused by violations of a third party's rights under the statute.

III. MCDONALD LACKS STANDING OR A CAUSE OF ACTION UNDER § 1981

The district court correctly ruled that, because McDonald has alleged no injury to any actual or potential contractual relationship of his own, his § 1981 claim must be dismissed. Section 1981 simply "can[not] be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

A. McDonald Was Not A Party To The Relevant Contracts

McDonald has suffered no injury to his personal right to "make and enforce contracts" free from racial discrimination, because he has not alleged any contract to which he was personally a party, or hoped to be a party. The only contracts at issue in this case are between two corporations, JWM and Domino's. McDonald has not alleged the existence of any other contract that might ground a cause of action under § 1981.[12] All rights and obligations

---

[12] McDonald's complaint speaks only of the JWM-Domino's contracts as the source of his claims. *See* Pet. App. 11 (Domino's and JWM entered into contracts); *id.* at 14 (Domino's breached contracts with JWM); *id.* at 15 (describing cause of action, "JWM had contracts with Domino's"); *id.* at 16 (Domino's failed to perform its obligations under its contracts with JWM, in violation of § 1981); *id.* at 17 (seeking damages in the form of, *inter alia*, payments Domino's would have made under its contracts with JWM). His briefing has never strayed from that focus. McDonald's reply brief in the Ninth Circuit attempted to distinguish the Seventh Circuit's decision in *Kyles*, for example, only by arguing that "the *Kyles* Plaintiffs never sought a contractual relationship. Thus the case is distinguishable from the instant case in that here Plaintiff negotiated four lease contracts

under these contracts belong to JWM and not to McDonald. If JWM had breached the contracts, McDonald could not be sued for breach. And the allegations that Domino's breached those contracts were properly brought (and settled) by JWM. A violation of JWM's right to "make and enforce" these contracts would not, even if proven, establish any injury *to McDonald personally* that is cognizable under § 1981.

McDonald's status as president and sole shareholder does not affect this conclusion. *See Danco*, 178 F.3d at 14 (president and sole shareholder of contracting company may not bring individual claim asserting injury to company's contractual rights); *Searcy*, 907 F.2d at 565 (same). It is a fundamental tenet of corporate law that "[t]he contract of a corporation is the contract of the legal entity, and not of the shareholders individually," and that "a shareholder, even a principal or sole shareholder, has no individual cause of action against another who has a contract with the corporation." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 29, at 497, 500 (perm. ed., rev. vol. 1999). Nevada law, which presumably governs these contracts, follows this traditional rule. *See Marymont v. Nev. State Banking Bd.*, 111 P. 295, 299 (Nev. 1910) ("[W]henever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, but not the contract of the individual members ....") (citing *Bank of Augusta v. Earle*, 38 U.S. 519 (1839)).

It bears emphasis that McDonald himself *chose* to do business through JWM, precisely in order to avoid

---

to construct restaurants for Domino's to lease. It was during his demand that Defendants execute the contracts according to the signed provisions that the egregious 'you people' remark occurred." Plaintiff-Appellant's Reply Br. at 7-8 (footnote omitted). The leases McDonald relies upon to distinguish *Kyles* were all between Domino's and JWM.

exercising his own personal right to "make and enforce contracts." The corporate intermediary he created insulated him from privity of contract with Domino's, and ensured that he would have no personal liability or duties. That structure proved to be wise from McDonald's perspective, as JWM has since defaulted on its obligations and declared bankruptcy. But after taking advantage of the corporate form to protect himself from contractual liability, McDonald cannot now turn around and bring a claim that relies on the existence of a personal contractual relationship that he successfully disclaimed for all other purposes.[13]

McDonald cannot escape that conclusion by arguing that he has rights under the JWM-Domino's contracts as a third-party beneficiary. First, it is by no means clear that third-party beneficiaries have any rights under § 1981. The text protects the right "to make and enforce contracts," which does not on its face suggest extension of rights to non-parties. As the States' *amicus* brief explains at length, third-party beneficiaries did not have any right to enforce a contract under the common law of contracts when the Thirty-Ninth Congress enacted the 1866 Act. There is no reason to think that Congress anticipated that the right to "make and enforce contracts" would extend beyond the

---

[13] There are, of course, limited circumstances in which courts permit a corporation to be treated as its shareholders, under the "alter ego" or "veil piercing" doctrine. That doctrine applies when the shareholder is engaging in fraud and is abusing the corporate form. *See, e.g., Wallace ex rel. Cencom Cable Income Partners II v. Wood*, 752 A.2d 1175, 1183-85 (Del. Ch. 1999). It would make no sense to apply that doctrine in this context because it would serve to reward a shareholder with a new cause of action under § 1981 for successfully defrauding others. *See Kaplan v. First Options of Chicago, Inc. (In re Kaplan)*, 143 F.3d 807, 812 (3d Cir. 1998) ("[S]ince Kaplan chose to structure his business in the corporate form and received the benefits of that form by avoiding liability for MKI's debts, the derivative injury rule prevents him from piercing the corporate veil in reverse in order to recover individually for MKI's losses."). In any event, McDonald has never claimed that JWM was a sham, and should be estopped from doing so.

contracting parties. Even the 1991 Amendments only extended the scope of § 1981 to the limits of the "contractual relationship." Although they may have certain rights, third-party beneficiaries are not part of the "contractual relationship" even under modern law.

In any event, McDonald has no third party beneficiary rights. Even under the modern view, only *intended* beneficiaries of contracts have rights as third parties, and any intent to benefit the third party must appear on the face of the contracts. *See Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824-25 (Nev. 1977) ("[T]here must clearly appear a promissory intent to benefit the third party, and ultimately it must be shown that the third party's reliance thereon is foreseeable.") (citations omitted); *see also Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979) (when corporation is party to contract, president/sole shareholder lacks standing to bring contract claim because he is at most an incidental beneficiary). McDonald has never alleged, and could not plausibly allege, that Domino's entered into contracts with JWM specifically in order to benefit McDonald personally. Indeed, any suggestion that the shareholders, officers or employees of a vendor or contractor are third-party beneficiaries of its contracts would throw commercial law into turmoil.

Because McDonald has no contractual rights under the JWM-Domino's contracts, he may not bring a suit arising from the termination of those contracts under § 1981.

B. Respondent's Allegation Of Individual Injuries Does Not Create Standing

McDonald claims to have suffered "individual" injuries separate and apart from any losses by JWM—principally "pain and suffering, emotional distress, and humiliation." Pet. App. 16. As explained above, however, a discrete injury "fairly traceable" to the acts of the defendant is the constitutional *minimum* for standing, *Lujan*, 504 U.S. at

560, but is not alone sufficient to establish statutory standing or a cause of action absent a clear expression of intent by Congress to expand standing to the constitutional limit. Absent such an expression, collateral, derivative injuries caused by a violation of someone else's statutory rights are not generally recoverable. McDonald therefore lacks standing under § 1981 for the same reason that this Court dismissed the § 1981 claims of the taxpayer plaintiffs in *Warth v. Seldin*: he is "asserting the rights or legal interests of others in order to obtain relief from injury to [himself]." 422 U.S. at 509.

McDonald's only response has been to change the subject. In his briefing to the Ninth Circuit, McDonald focused on the general rule of corporate law that a stockholder cannot maintain a personal action against a third party for harm caused to the corporation, and argued that his suit fell under an exception to that rule for cases in which the third party's actions that injure the corporation also cause separate and distinct injuries to the stockholder. *See, e.g., Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988) (shareholders can bring individual claim if they suffer injuries "*directly or independently* of the corporation"). The Ninth Circuit accepted that argument, and held that "[w]hile a shareholder cannot maintain a civil rights action for injury suffered only by the corporation, ... '[t]he same discriminatory conduct can result in both corporate and individual injuries.'" Pet. App. 1-2 (citation omitted).

The Ninth Circuit missed the point. The corporate law prohibition against shareholders asserting claims for injury to the corporation is certainly relevant to this case, as is the related but broader principle that damages derivative of injuries to someone else cannot be recovered. Those rules provide independent reasons why most of McDonald's alleged injuries would not be recoverable *even if § 1981 did*

give him a cause of action. McDonald's various allegations of financial injury to JWM would, for example, certainly be barred by the corporate law rule even if otherwise viable under § 1981. To the extent that he claims to have lost "front pay," Pet. App. 17, that injury is plainly derivative of the injury to JWM.[14] The same is true of his "emotional distress" damages, to the extent that McDonald claims to have suffered emotional distress simply because Domino's breached its contracts with JWM. *See, e.g., Guides*, 295 F.3d at 1072 ("Foote alleged that she suffered emotional distress as a result of the defendants' actions. However, this distress arose from the failure of the defendants to contract with or lease to Africa House and was a product of the economic damages which were suffered by the corporation."); *Bellows*, 118 F.3d at 276-77 & n.27 (president and majority shareholder cannot sue under § 1981 for emotional distress stemming from discrimination against the corporation).

McDonald may be correct that, to the extent he claims emotional injuries from conduct actually directed *at him personally*, such as Phillips's alleged statement, those injuries may not be barred by corporate law or by the rule against derivative injuries. But that does not remotely establish that § 1981 gives him a cause of action to recover for those injuries. The general rule that a stockholder may not bring a direct action for injury to the corporation operates to preclude a stockholder's *otherwise viable* cause of action on the ground that it belongs, as a matter of

[14] As this Court explained in *Holmes*, one of the reasons for the rule against derivative claims was (and is) that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." 503 U.S. at 269. Permitting an employee or shareholder to recover for "individual" losses that are the direct consequence of business setbacks suffered by their employer raises obvious risks of double recovery.

corporate law, to the corporation. *See* 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5908, at 430-33, § 5911, at 444-60 (perm. ed., rev. vol. 2000); *see also Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (shareholder may not bring individual action under Civil Rights Act for injury to corporation). The broader rule against derivative injuries similarly prevents a plaintiff *who can otherwise establish all of the elements of a viable cause of action* from recovering for damages that are derivative of harm done to someone else. Those principles may not independently bar all of McDonald's claims, but they are essentially irrelevant to the primary question presented in this case: whether § 1981 gives McDonald any right to judicial relief.

C. McDonald Has Not Alleged Any Viable Third-Party Interference Claim, And Could Not

This Court has suggested that § 1981 might permit a cause of action for interference with the right to "make and enforce contracts" by a third-party not actually in privity with the defendant. *See Warth*, 422 U.S. at 514 n.22; *see also, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (arguably permitting third-party interference claim under § 1982). But even if a third-party interference claim would be viable under § 1981 in an appropriate case, McDonald has not alleged such a claim and could not.

First, McDonald's complaint, even read in the most generous possible light, focuses exclusively on the JWM-Domino's contracts as the direct source of his injuries. *See* Pet. App. 15-16; *supra*, at 25-26. He does not allege that he was a party to any other contractual relationship that Domino's might have interfered with. Although the cursory reference to "front pay" in his prayer for relief might suggest an employment contract with JWM, McDonald never actually alleges such a relationship and there is no

reason to assume it. Courts have been reluctant to presume an employment contract between a corporation and its president/sole shareholder absent evidence that one exists. *See, e.g., Bellows.*, 118 F.3d at 275 ("Bellow's mere ownership interest in and position as president of PICI does not, in and of itself, suffice to establish a contractual relationship."); *cf.* 2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 (perm. ed., rev. vol. 1998) (officers are not as a matter of law employees and courts must look to context). There is no evidence or even allegation in this case that McDonald's economic relationship with JWM was anything other than the relationship between a corporation and its sole shareholder.

Second, § 1981 only protects plaintiffs from being *intentionally* deprived of their contract rights. *Gen. Bldg.*, 458 U.S. at 396. An employee might have a viable § 1981 third-party interference claim against a company contracting with his employer if, for example, the defendant asked the employer to fire the employee, or to staff the employee on a different project, because of his race, and the employer obliged. But McDonald's complaint does not remotely allege that Domino's *purpose* in terminating its JWM contracts was to induce JWM to violate any contractual commitments it had made to McDonald. Indeed, any such allegation would be facially absurd. As the president and 100% shareholder of JWM, McDonald completely controlled both sides of any (hypothetical) contractual relationship between JWM and himself. Domino's obviously knew that.

Third, to the extent that McDonald premises his claim to "individual injuries" on the fact that his day-to-day job responsibilities changed when JWM lost the Domino's contract, his claim could not genuinely state any interference with a term, condition, or benefit of any

hypothetical contract with JWM. Employers win or lose clients and contracts every day, and those gains and losses will always affect the specific tasks that their own employees will be performing. But no employee has a contractual entitlement to his employer winning any particular bid or retaining any particular client. *See, e.g., Bellows*, 118 F.3d at 276 ("While it may [be] true that Bellow's income suffered after Amoco allegedly interfered with his asserted contractual relationship with PICI, this loss of income was not a result of any change in his relationship or status with PICI—as he continued to be PICI's 51% owner, president, and chief executive officer—but rather was caused by the fact that PICI no longer received the same high volume of work from Amoco."). Stated differently, no one has the right to be free from alleged "interference" with their employment that does not actually impact their rights as an employee. *See, e.g.*, Restatement (Second) of Torts § 766 (1977) (recognizing liability for intentional interference with contract only if the defendant "caus[es] the third person not to perform the contract").

Finally, to the extent McDonald's claim is premised on emotional distress stemming from the alleged racially insensitive comment by Ms. Phillips, that comment could not have altered the "terms, and conditions" of McDonald's employment or of any other contractual relationship, as a matter of law.[15] The statutory definition of "make and enforce contracts" now includes "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). In this context Congress's use of the phrase "terms, and conditions" cannot

---

[15] Her alleged statement that "I don't like dealing with you people anyway" was made to JWM's president during a conversation about the extensive disputes between JWM and Domino's. Pet. App. 12-13. It is not unmistakably discriminatory on its face.

have been an accident. That phrase also appears in Title VII. *See* 42 U.S.C. § 2000e-2(a)(1) (protecting the "compensation, terms, conditions, or privileges of employment"). This Court has already recognized that, in the context of employment contracts, Congress meant for the substantive rights protected by Title VII and § 1981 to be essentially identical. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). When Congress extended § 1981 to cover the "terms, and conditions of the contractual relationship" in the Civil Rights Act of 1991, it therefore must have intended those words to have the same, well-understood meaning that they have in Title VII.

Under Title VII, the phrase "terms, [and] conditions ... of employment" serves to clarify that changes in working conditions violate the statute only if they rise to such a severe level that they change the character of the employment relationship itself. A change in the "terms and conditions" of employment would include, for example, "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). It does not, however, encompass racially or sexually offensive statements or harassment in the workplace, even if that harassment causes emotional distress and humiliation, unless the conduct is "severe or pervasive enough to create an objectively hostile or abusive work environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). That standard applies in racial harassment cases no less than in sexual harassment cases. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 & n.10 (2002).

Congress's use of the "terms, and conditions" language clearly indicates that the same standard should govern § 1981 claims, and McDonald cannot satisfy it. It is settled beyond question that one isolated comment does not make a

working environment severely or pervasively abusive. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("A recurring point in [our] opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citation omitted). That should be even more true when, as here, the comment comes not from a supervisor or coworker but from an outsider to the employment relationship. McDonald's allegations concerning Ms. Phillips would therefore fail to allege any injury to his right to "make and enforce contracts" even if all of the other elements of a valid cause of action were present.

IV. ALLOWING MCDONALD TO SUE FOR THESE INJURIES WOULD UPSET THE BALANCE OF THE CIVIL RIGHTS LAWS

The fact that McDonald has no cause of action under § 1981 for his individual injuries does not suggest any gap in the coverage of the Nation's civil rights laws. It is entirely consistent with the comprehensive statutory regime Congress has enacted to combat racial discrimination, and with well understood state common law principles. Permitting McDonald's claim to proceed, however, would have far-reaching and disruptive consequences.

The law simply does not create a remedy for every harm. Even before *Cort v. Ash*, 422 U.S. 66 (1975), it was settled that there is not a private judicial remedy for every injury traceable to a violation of a federal statute. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). To the contrary, the general rule is that there is no cause of action to recover collateral, derivative injuries suffered by persons other than the person whose statutory rights were actually violated. And when the injury in question is "pain and suffering, emotional distress, and humiliation," Pet. App. 16, the law has always imposed strict limitations on recovery.

Indeed, a claim by an affiliate of a contracting party for emotional distress caused by a breach of contract is a complete stranger to the law.

McDonald could not sue Domino's under any contract theory because he is not in privity with Domino's and was not an intended third-party beneficiary of the JWM-Domino's contracts. And emotional distress is not generally compensable under contract law in any event. *See, e.g.*, Restatement (Second) of Contracts § 353 (1981).

Emotional distress damages can be recovered in tort, but generally only when incident to an actual physical injury. Recovery for purely emotional injuries under the tort of "intentional infliction of emotional distress" is permitted only when the emotional injury is "severe" and the defendant's conduct is both intentional and "extreme and outrageous." *See, e.g., Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 110 P.3d 30, 52 (Nev. 2005). And when courts have permitted *negligent* infliction of emotional distress claims at all, that doctrine has been carefully cabined by doctrines limiting potential plaintiffs. *See, e.g., Consol. Rail Corp. v. Gotshall*, 512 U.S. 532, 545 (1994) ("No jurisdiction, however, allows recovery for all emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another."). The three common tests require the plaintiff to prove either (1) that he also suffered contemporaneous physical injury caused by the defendant's negligence; (2) that he was in the "zone of danger" of actual physical injury; or (3) that he was a close relative of a victim seriously injured by the defendant's negligence and actually witnessed the injury. *Id.* at 546-49. Obviously McDonald could not satisfy any of these tests.

Federal civil rights law also imposes strict limitations on relief for purely emotional distress. As explained above, under Title VII an employee has no redress for emotional

injuries caused by racially offensive statements unless those statements are so severely or pervasively abusive as to create a hostile work environment. *E.g., Harris*, 510 U.S. at 21. The alleged comment by Ms. Phillips that McDonald claims caused him to experience emotional distress simply does not rise to that level, as a matter of law. A § 1981 cause of action in these circumstances would, therefore, be inconsistent with the background law that governs comparable claims in other contexts.

Allowing anyone collaterally injured by an alleged violation of § 1981 to sue under that statute would also radically expand the class of plaintiffs that can sue for discrimination under federal law. Although the unique circumstances of this case allow McDonald to claim that he was the direct target of the alleged discrimination, his theory of recovery cannot be limited to "sole shareholder" situations like this one. That theory—and the Ninth Circuit's holding—would extend a cause of action to *any* person suffering a discrete "individual" injury incident to a racially motivated breach of contract.

That class of potential plaintiffs is essentially limitless. The termination of any contractual relationship will have effects that ripple outward through the economy. When a general contractor loses a contract, that loss may also injure his wife and children, his employees, his subcontractors and their families and employees, the lumber supplier that would have sold to the subcontractor, the lumber supplier's own timber supplier, and so on forever. And the potential injuries extend even beyond persons in the direct chain of economic consequences. A bystander could suffer emotional distress injuries of the sort alleged by McDonald. *See, e.g., Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1180-81 (7th Cir. 1998) (refusing to permit claim for emotional injury to bystander under Title VII). A right to be free from all collateral consequences of racial discrimination in the

private contracting behavior of others, anywhere in our vast economy, would therefore be an extremely radical innovation. This Court has repeatedly rejected any reading of the antitrust laws or of civil RICO that would raise the specter of such ever-expanding derivative liability, even though those statutes on their face grant standing to any person injured "by reason of" a statutory violation. *See, e.g.*, *Holmes*, 503 U.S. at 268-69; *Associated Gen. Contractors*, 459 U.S. at 532-33. And this Court has recognized that Congress intended § 1981 to create only a narrow, specific right to "make and enforce contracts" free from racial discrimination. *E.g.*, *Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984) ("Title 42 U. S. C. § 1981 guarantees the right to be free from racial discrimination in specific activities, such as making contracts ....")

Permitting such collateral suits would also create a host of practical problems. For example, every employee of a large corporation would have standing to bring a lawsuit alleging that his or her employer lost a big contract for racially discriminatory reasons, even if the employer itself did not believe that allegation or simply preferred to preserve its relationship with the prospective client rather than litigate. It will also become essentially impossible to settle claims of discrimination in contracting—which, of course, includes essentially all ordinary employment discrimination claims given the overlap between § 1981 and Title VII. Defendants will have little incentive to buy peace with the alleged direct victim of the discrimination if all of the plaintiff's employees have their own "individual" claims for collateral injuries. The brief for the Equal Employment Advisory Council as *amicus curiae* explains the practical consequences of the Ninth Circuit's ruling in greater depth. Difficulties like these are precisely why this Court has always refused, in the absence of a clear statement from Congress, to permit plaintiffs to litigate the rights of third

parties not before the court. *E.g.*, *Singleton*, 428 U.S. at 113-14.

If there were any cognizable injury to the right "to make and enforce contracts" flowing from the termination of the JWM-Domino's contracts, that injury was suffered by JWM, not McDonald. JWM brought a breach of contract claim against Domino's and settled it. If JWM had wanted to join a claim under § 1981 to that breach of contract claim, it could have done so.[16] And if McDonald had wished to enter into a personal contractual relationship with Domino's himself, he possibly could have done that as well. The one thing he *cannot* do is use the corporate form to intentionally distance himself from any individual contractual relationship with Domino's, and then turn around and sue for injury to that contractual relationship in his personal capacity. McDonald himself has not suffered any injury to the specific interests protected by § 1981, and therefore cannot bring suit under that statute.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions that it be dismissed.

---

[16] The circuits are unanimous that a corporation can bring a claim under § 1981 based on allegations that its contractual rights were impaired due to racial animus towards its owner or employees. *See, e.g.*, *Danco*, 178 F.3d at 13-14; *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706-07 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1057-60 (9th Cir. 2004); *Guides*, 295 F.3d at 1072; *Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1567-70 (D.C. Cir. 1991).

Respectfully submitted,

ELISA D. GARCIA C.
JOEL F. GRAZIANI
DOMINO'S PIZZA LLC
30 FRANK LLOYD WRIGHT DRIVE
ANN ARBOR, MI 48106-0997
(734) 930-3678

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-593

IN THE
Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., AND DEBBIE PEAR,
Petitioners,

v.

JOHN MCDONALD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, COLORADO, KANSAS, MICHIGAN, NEVADA, OHIO, OREGON, TENNESSEE, UTAH, AND WASHINGTON, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Troy King
Attorney General
Kevin C. Newsom
Solicitor General
Counsel of Record
STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

July 14, 2005

(Additional counsel for amici curiae are listed inside the front cover.)

ADDITIONAL COUNSEL

JOHN W. SUTHERS
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
7th Floor
Denver, CO 80203

PHILL KLINE
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Avenue
Topeka, KS 66612-1597

MICHAEL A. COX
ATTORNEY GENERAL
STATE OF MICHIGAN
P.O. Box 30212
Lansing, MI 48909

BRIAN SANDOVAL
ATTORNEY GENERAL
STATE OF NEVADA
Nevada Department of
Justice
100 N. Carson Street
Carson City, NV 89701

JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO
State Office Tower
30 E. Broad St.
Columbus, OH 43215-3428

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court Street, N.E.
Salem, OR 97301

ROBERTO J. SÁNCHEZ
RAMOS
SECRETARY OF JUSTICE
COMMONWEALTH OF
PUERTO RICO
P.O. Box 9020192
San Juan, PR 00902-0192

PAUL G. SUMMERS
ATTORNEY GENERAL
STATE OF TENNESSEE
P.O. Box 20207
Nashville, TN 37202-0207

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
Utah State Office Complex
East Office Bldg., Suite 320
Salt Lake City, UT 84114-
2320

ROB MCKENNA
ATTORNEY GENERAL
STATE OF WASHINGTON
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. §1981?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The "Zone of Interests" Component of Prudential Standing Doctrine Governs McDonald's Right To Sue. 5

II. As It Applies Here, the "Zone of Interests" Test Requires Evidence of a Specific Congressional Intent To Protect the Would-Be Plaintiff. 7

III. By Any Measure, McDonald Is Not Within the Zone of Interests Congress Intended To Protect in Section 1981. 11

A. McDonald Lacks Standing as a Contract Party. 12

B. McDonald Lacks Standing as a Third-Party Beneficiary. 14

1. Third-Party Beneficiaries Are Not Within the Zone of Interests Congress Intended To Protect in Section 1981 14

2. McDonald Is Not a Third-Party Beneficiary of the Domino's-JWM Contracts. 26

IV. McDonald's Proposed Construction of Section 1981 Would Dramatically Expand Liability and Trigger a Flood of New Suits. 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Air Courier Conf. of America v. American Postal Workers Union, 498 U.S. 517 (1991) 7

Alexander v. Sandoval, 532 U.S. 275 (2001) 10

Allen v. Wright, 468 U.S. 737 (1984) 10

Amesco Exports, Inc. v. Associated Aircraft Mfg. & Sales, Inc., 977 F. Supp. 1014 (C.D. Cal.), *vacated on other grounds*, 87 F. Supp. 2d 1013 (C.D. Cal. 1997) 28

Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 7, 8

Baidee v. Brighton Area Schs., 695 N.W.2d 521 (Mich. Ct. App. 2005) 29

Bank of Missouri v. Benoist, 10 Mo. 520 (1847) 22

Barringer v. Warden, 12 Cal. 311 (1859) 20

Belt v. McLaughlin, 12 Mo. 433 (1849) 22

Bennett v. Spear, 520 U.S. 154 (1997) ..... passim

Blessing v. Freestone, 520 U.S. 329 (1997) 16

Blymire v. Boistle, 6 Watts 182 (1837) 22

Bohanan v. Pope, 42 Me. 93 (1856) 20

Bristow v. Lane, 21 Ill. 194 (1859) 20

Brown v. Hazen, 11 Mich. 219 (1863) 22

Brown v. O'Brien, 1 Rich. 268 (S.C. Ct. App. 1845) 20

Butterfield v. Hartshorn, 7 N.H. 345 (1834) 21

California v. Sierra Club, 451 U.S. 287 (1981) 11

Cannon v. University of Chicago, 441 U.S. 677 (1979) 9, 10, 11

Carroway v. Cox, 44 N.C. 173 (1852) 22

Chamberlain v. New Hampshire Fire Ins. Co., 55 N.H. 249 (1875) 22

Clarke v. McFarland's Executors, 5 Dana 45 (Ky. Ct. App. 1837) 21

Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987) ..... passim

Cort v. Ash, 422 U.S. 66 (1975) 9, 11

Crumbaugh v. Kugler, 3 Ohio St. 544 (1854) 20

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999) 12, 29

Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999) 6

Dow v. Clark, 73 Mass. 198 (1856) 21

Dutton v. Poole, 83 Eng. Rep. 523 (K.B. 1677) 17

Eichelberger v. Murdock, 10 Md. 373 (1857) 25

FEC v. Akins, 524 U.S. 11 (1998) 6

Felton v. Dickinson, 10 Mass. 287 (1813) 21

Finney v. Finney, 16 Pa. 380 (1851) 22

Fugure v. Mutual Soc'y of St. Joseph, 46 Vt. 362 (1874) 22

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 6

Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019 (9th Cir. 1983) 2

Hackett v. McGuire Bros., Inc., 445 F.2d 442 (3d Cir. 1971) 6

Hall v. Huntoon, 17 Vt. 244 (1845) 22

Hendrick v. Lindsay, 93 U.S. 143 (1876) 25

Hind v. Holdship, 2 Watts 104 (Pa. 1833) 22

Howell v. Ketchikan Pulp Co., 943 P.2d 1205 (Alaska 1997) 29

Hybart v. Parker, 140 Eng. Rep. 1063 (C.P. 1858) 18

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 6

Jones v. Local 520, Int'l Union of Operating Engineers, 603 F.2d 664 (7th Cir. 1979) 14

Jones v. Miller, 12 Mo. 408 (1849) 23

Jones v. Thomas, 62 Va. 96 (1871) 22

Kyles v. J.K. Guardians Security Servs., Inc., 222 F.3d 289 (7th Cir. 2000) 13

Land v. Henry, 54 N.H. 57, 64 (1873) 22

Langridge v. Levy, 150 Eng. Rep. 863 (Ex. 1837) 18

Lawrence v. Fox, 20 N.Y. 268 (1859) 19, 20, 24, 26

Lee v. Mitchell, 953 P.2d 414 (Or. Ct. App. 1998) 28

Lucas v. Chamberlain, 47 Ky. 276 (1847) 20

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 5, 10

Manny v. Frazier's Administrator, 27 Mo. 419 (1858) 23

Martin v. Edwards, 548 P.2d 779 (Kan. 1976) 27

Martyn v. Hind, 98 Eng. Rep. 1174 (K.B. 1776) 17

McDonald v. Domino's Pizza, Inc., 107 Fed. Appx. 18 (9th Cir. 2004) 5

Meech v. Ensign, 49 Conn. 191 (1881) 25

Mellen v. Whipple, 67 Mass. 317 (1854) 21

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 11

National Bank v. Grand Lodge, 98 U.S. 123 (1878) 25

National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 7, 8

Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974) 14

Page v. Becker, 31 Mo. 466 (1862). 23

Pangborn v. Saxton, 11 Vt. 79 (1839) 22

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 26

Pelletier v. Sordoni/Skanska Constr. Co., 825 A.2d 72 (Conn. 2003) 29

Pipp v. Reynolds, 20 Mich. 88 (1870) 22

Raines v. Byrd, 521 U.S. 811 (1997) 5, 6

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 26

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) 27

Ross v. Milne, 12 Leigh 204 (Va. 1841) 22

Shotwell v. Gilkey's Administrators, 31 Ala. 724 (1858) 20

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 10

Stuart v. James River & Kanawha Co., 65 Va. 294 (1874) 22

Styron v. Bell, 53 N.C. 222 (1860) 22

Taylor v. Facility Constructors, Inc., 360 F. Supp. 2d 887 (N.D. Ill. 2005) 29

Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916) 11

The Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc., 295 F.3d 1065 (10th Cir. 2002) 13, 29

Thompson v. Gordon, 3 Strob. 196 (S.C. Ct. App. 1848) 20

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 6

Tweddle v. Atkinson, 121 Eng. Rep. 762 (Q.B. 1861) 18, 21

Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 5

Warren v. Batchelder, 15 N.H. 129 (1844) 22

Warth v. Seldin, 422 U.S. 490 (1975) 10

Willard v. Worsham, 76 Va. 392 (1882) 22

Willis v. E.I. DuPont De Nemours & Co., 76 F. Supp. 1010 (E.D. Okla.), *rev'd on other grounds*, 171 F.2d 51 (10th Cir. 1948) 28

Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842) 18

Statutes

42 U.S.C. §1981 ..... passim

42 U.S.C. §1981(a) 15

42 U.S.C. §1981(b) 15

42 U.S.C. §1981(c) 1

42 U.S.C. §1983 16

42 U.S.C. §3610(a) 6

Administrative Procedure Act §10(a), 5 U.S.C. §702(a) 7

Other Authorities

H.R. Rep. No. 102-40(I) (Apr. 14, 1991) 26

H.R. Rep. No. 102-40(II) (May 17, 1991) 26

Cong. Globe, 39th Cong., 1st Sess. 475, 476, 478, 598 (Jan. 29-Feb. 2, 1866) 16

Restatement (Second) Contracts (1981) 15, 27, 28

Joseph Chitty, Jr., *Contracts* (London 1842) 18

Lawrence M. Friedman, *A History of American Law* (2d ed. 1985) 19

Lawrence M. Friedman, *Contract Law in America* (1965) 25

Oliver W. Holmes, *The Common Law* (Mark Howe ed., 1963) 25

Christopher C. Langdell, *A Summary of the Law of Contracts* (2d ed. 1880) 24

Williston on Contracts (R. Lord, ed., 4th ed. 2000) ..... passim

Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992) ..... passim

William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988) 8

M.H. Hoeflich & E. Perelmuter, *The Anatomy of a Leading Case:* Lawrence v. Fox *in the Courts, the Casebooks, and the Commentaries*, 21 U. Mich. J. L. Ref. 721 (1988) 17, 19, 24, 26

Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case*, 9 Law & Hist. Rev. 327 (1991) ..... passim

Jonathan R. Siegel, *Zone of Interests*, 92 Geo. L. J. 317 (2004) 7

Guenter Treitel, *Some Comparative Notes on English and American Contract Law*, 55 SMU L. Rev. 357 (2002) 18, 19

Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109 (1985) 17, 19, 20, 25

INTEREST OF AMICI

This case involves the provision of 42 U.S.C. §1981 that protects an individual's right to "make and enforce contracts" free from racial discrimination. The States, of course, wholeheartedly endorse the policy that underlies §1981; none of the amici here sanctions or tolerates race discrimination in any shape, form, or fashion. At the same time, the States, whose officers are frequently made defendants in §1981 actions, have a keen interest in ensuring that §1981's intended scope is observed.

The Ninth Circuit's sweeping decision here is of great concern to the States, which routinely contract with private-sector companies to perform all manner of important tasks. Indeed, other than the Federal Government - to which §1981 does not apply at all, *see* 42 U.S.C. §1981(c) - the States may well be the most regular institutional contractors in the country. Among the numerous subjects of state contracts, to name just a few, are the construction of public roads and bridges, the survey and appraisal of public land, the management of state assets, the preservation of historical artifacts, and, in some instances, even the litigation of court cases. (In terms of dollars, a report presented to the Contract Review Committee of the Alabama Legislature in September 2004 provides a snapshot; it shows, for that month alone, 280 state contracts totaling almost $50 million.) By conferring §1981 standing on anyone who can show some incidental injury resulting from a contract's breach - even persons who are neither parties to nor intended third-party beneficiaries of the contracts in question - the Ninth Circuit's decision dramatically expands the prospects for state liability and increases the likelihood that important state business will bog down in litigation.

A simple example will illustrate: Suppose that a state Department of Transportation contracts with a large construction company to build a public road. For whatever

reason, the relationship between the DOT and the company sours, and the DOT cancels the contract. Then, out of the blue, one of the construction company's many employees (say, a minority engineer) sues the DOT director under §1981, alleging that, in fact, the DOT's cancellation was motivated by the large number of minority workers on the company's payroll. Certainly, in the language of McDonald's filings in this case, our hypothetical employee could demonstrate a "personal injury" independent of his company. Specifically, in the words of McDonald's complaint, he could show that he had "suffer[ed] monetary damages" – say, the marginal loss of revenues that would have trickled down to workers – as well as "pain and suffering, emotional distress, and humiliation." Pet. App. 16. Under the Ninth Circuit's rule, our employee – despite his remove from the "contract[ing]" process that §1981 aims to protect – could seek to enjoin the DOT's cancellation and to collect damages from DOT decisionmakers. *See Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983) (allowing §1981 suit by Hispanic employee in similar circumstances).

The litigation explosion contemplated by the Ninth Circuit's approach to §1981 is breathtaking, and the ensuing disruption of state business, certain. The States respectfully urge the Court to reaffirm §1981's intended scope.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision conferring standing on anyone who can show some personal injury from a contract's breach – no matter how far removed he or she is from the "contract[ing]" process that §1981 protects – ignores basic standing doctrine and §1981's intended scope.

1. The "zone of interests" component of prudential standing doctrine governs McDonald's right to sue here. This Court has emphasized that the zone-of-interests test applies unless it is "expressly negated" by Congress – as, for example, where Congress grants a "particular plaintiff" the

right to sue or broadly authorizes civil actions challenging allegedly unlawful conduct. Congress did neither in §1981. Section 1981 certainly does not give any particular plaintiff a cause of action, nor does it use the expansive term "aggrieved," which has traditionally been viewed as indicative of a congressional intent to confer standing broadly.

2. This Court has consistently held that "congressional intent" defines the zone of interests protected by a particular statute. And although decisions applying the zone-of-interests test in the APA context have hedged on whether a specific intent to protect the would-be plaintiff is required, this Court has recognized that where, as here, the "generous review provisions" of the APA are not implicated, there is warrant for a strict approach to marking the covered zone. Specifically, this Court has analogized non-APA zone-of-interests cases to cases involving implied private rights of action, where a plaintiff must show (i) that Congress intended to create a private remedy and, further (ii) that Congress enacted the statute in question specifically for the benefit of "a special class of which the plaintiff is a member." The Court should now formalize the implied-right-of-action analogy and hold that to satisfy the zone-of-interests test a non-APA plaintiff must show that Congress specifically intended to protect someone in his shoes.

3. However one measures §1981's zone of interests, McDonald falls outside it. Section 1981, again, protects the right to "make and enforce contracts." The only persons who have (or can get) the "contract[]" rights to which §1981 refers are contract parties and intended third-party beneficiaries. Because McDonald is neither, he has no standing.

a. McDonald lacks standing as a contract party because, as his own complaint repeatedly acknowledges, he is not a party to the contracts in question.

b. McDonald also lacks standing as a third-party beneficiary, for two reasons. First, a thorough historical review shows that the third-party-beneficiary rule – a staple

of modern contract doctrine – had not taken hold when Congress enacted §1981 in 1866. (Recall that, whatever its precise contours, the zone-of-interests test is fundamentally a function of "congressional intent.") In England, it had become settled by 1861 that only contracting parties could sue. So, too, in this country, while several States had seemingly embraced third-party beneficiary doctrine by the time §1981 was adopted, a number of others – Massachusetts, New Hampshire, Virginia, and Pennsylvania among them – had decisively rejected it. What is more, all seem to agree that mid-nineteenth-century law, under the influence of the "classical contract school," was trending away from recognition of third-party rights. All of this is to say that mid-nineteenth-century contract doctrine was, at the very least, not so clearly *supportive* of third-party rights that one could simply assume that Congress – having said nothing in text or legislative history one way or the other – intended to incorporate into §1981 anything like the modern-day third-party-beneficiary rule.

Second, and in any event, even assuming that §1981 could be read to protect third-party beneficiaries, McDonald would not qualify. Under modern doctrine, a third party can sue on a contract only if he can show that the contracting parties specifically intended to benefit him when they struck their deal. There is nothing to suggest that the parties here contracted with the intention of benefiting McDonald specifically. McDonald, rather, was at most an incidental beneficiary and, as such, obtained no right to performance.

ARGUMENT

This is a suit brought under 42 U.S.C. §1981 – specifically, under the provision of that statute protecting citizens' rights to "make and enforce contracts" without regard to race. While recognizing that other circuits have reached "a contrary result," the Ninth Circuit here held that an individual who is "not formally a party to [a] contract" may "nonetheless sue under §1981 insofar as he seeks recovery for individual injuries separate and distinct from" those suffered by the contracting parties. Pet. App. 2. Because the Ninth Circuit's decision ignores both elementary standing doctrine and §1981's intended scope, it should be reversed.

I. The "Zone of Interests" Component of Prudential Standing Doctrine Governs McDonald's Right To Sue.

Throughout the appellate process, McDonald has maintained that he has standing to litigate his §1981 claim "because he can demonstrate unique, personal injury independent of his company." Br. of Appellant at 11, *McDonald v. Domino's Pizza, Inc.*, 107 Fed. Appx. 18 (9th Cir. 2004) (No. 02-16900). And, as noted above, the Ninth Circuit so held.

McDonald's allegations of "personal injury" are surely sufficient to satisfy Article III's baseline standing requirement that a plaintiff demonstrate a concrete, particularized, and actual "injury in fact." *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But the standing inquiry does not end with Article III. "In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72 (1982)). "Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the *zone of interests* protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.* (emphasis added).

This Court has made clear that its "prudential standing doctrine" – including the zone-of-interests component at issue here – "applies unless it is expressly negated" by Congress. *Id.* at 163. Specifically, Congress can "eliminate[] any prudential standing limitations" by expressly "grant[ing] a particular plaintiff the right" to sue. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). In *Trafficante v. Metropoli-*

tan Life Insurance Co., 409 U.S. 205 (1972), for instance, this Court found that Congress had manifested its "'intention to define standing as broadly as permitted by Article III'" – and, thus, to negate prudential standing limitations – by giving an express cause of action to "'any person who claims to have been injured by a discriminatory housing practice.'" *Id.* at 208 (quoting, respectively, *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), and 42 U.S.C. §3610(a)). Other decisions dispensing with prudential standing requirements follow a similar pattern – they deal with statutes in which Congress expressly and broadly authorized civil suits challenging allegedly unlawful conduct. *See, e.g., Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 328-29 (1999) ("Congress has eliminated any prudential concerns in this case by providing that '[a]ny person aggrieved ... may in a civil action obtain declaratory, injunctive, and any other appropriate relief ....'"); *FEC v. Akins*, 524 U.S. 11, 19 (1998) (statute providing that "[a]ny party aggrieved ... may file a petition" in district court); *Bennett*, 520 U.S. at 164 (statute providing that "any person may commence a civil suit"); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 102-03 (1979) (statute providing that "[t]he rights granted ... may be enforced by civil actions").

Section 1981 does not bear any of the markings of a statute that eliminates prudential standing limits and extends standing to the limits of Article III. Section 1981 certainly does not in so many words give any "particular plaintiff" the right to sue. *Raines*, 521 U.S. at 820 n.3. Nor does §1981 use the expansive term "aggrieved," which "[h]istory associates ... with a congressional intent to cast the standing net broadly." *Akins*, 524 U.S. at 19. Nor, for that matter, does §1981 expressly create any private cause of action at all; the right to sue for alleged violations of §1981 has been judicially implied. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *Runyon v. McCrary*, 427 U.S. 160, 168-74 (1976).

Because Congress did not by any measure "expressly negate[]" prudential standing requirements in §1981 (either in the original 1866 enactment or in the 1991 amendments), the "zone of interests" test governs McDonald's right to sue here. The question then becomes whether McDonald, as a non-party to the contract that forms the basis of his §1981 claim, falls within the "zone" that §1981 covers. Before turning to that specific question (which we will consider in Part III), we briefly address the role of congressional intent in marking the boundaries of a statute's zone of interests.

II. As It Applies Here, the "Zone of Interests" Test Requires Evidence of a Specific Congressional Intent To Protect the Would-Be Plaintiff.

The zone-of-interests test had its genesis in cases involving challenges to administrative action under §10(a) of the Administrative Procedure Act, 5 U.S.C. §702(a). *See, e.g., Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-403 (1987); *Air Courier Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 523-24 (1991); *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-99 (1998). In all honesty, this Court's explication of the test in APA cases has been somewhat inconsistent. In particular, while repeatedly affirming in broad terms that the task in applying the test is "basically one of interpreting congressional intent," *Clarke*, 479 U.S. at 394, the Court has "vacillate[d] between holding that the test requires a showing that Congress intended to benefit a would-be plaintiff and holding that it requires no such showing," Jonathan R. Siegel, *Zone of Interests*, 92 Geo. L. J. 317, 318 (2004).

Initially, the Court in *Clarke* noted that "there need be no indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400. Several years later, however, in *Air Courier*, the Court clarified that, in fact, a showing of congressional intent to benefit the plaintiff *is* required. *See* 498 U.S. at 524-28; *see also* Siegel, *supra*, at 330 ("By clear and

repeated statements, the [*Air Courier*] Court confirmed that the very heart of the test was whether Congress intended the [statute in question] to benefit [the would-be plaintiff] ....''). But then, in *National Credit Union*, the Court seemed to revert back to a *Clarke*-like view that courts "should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." 522 U.S. at 489. Dissenting in *National Credit Union*, Justice O'Connor identified the chief failing of an excessively lax zone-of-interests test: By "eschewing any assessment of whether [a given statutory] provision was intended to protect [a particular plaintiff's] interest" and by instead giving standing to anyone who "ha[s]" an interest that is "affected" by the statute's operation, courts would cause the zone-of-interests test to collapse into Article III's injury-in-fact requirement, "rendering the zone-of-interests test ineffectual." 522 U.S. at 505 (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

The dust-up over the zone-of-interests test's proper application in the APA context needn't detain the Court here, as McDonald's suit does not challenge agency action or otherwise involve the APA. This Court has clarified that, although initially a creature of the APA, the zone-of-interests test is a "prudential standing requirement[] of general application" that "applie[s] ... also in suits not involving review of federal administrative action." *Bennett*, 520 U.S. at 163. More to the point for present purposes, this Court has "made clear" that the zone-of-interests test applies more strictly (*i.e.*, to exclude more would-be plaintiffs) outside the APA context than within: "[T]he breadth of the zone of interests varies according to the provision of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the '"generous review provisions"' of the APA may not do so for other purposes." *Id.* (quoting *Clarke*, 479 U.S. at 400 n.16 (quoting *Data Processing*, 397 U.S. at 156)); *see also* William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 237 n.84 (1988) ("[P]laintiffs in [non-APA] cases have to meet a higher threshold test in showing that judicial protection of their interests is intended by the statute in question").

The lengthy discussion in *Clarke*'s footnote 16 (reiterated later in *Bennett*) provides a glimpse into the Court's thinking about the sometimes-loose application of the zone-of-interests test in the APA context and its comparatively strict application outside the APA. Referring to then-prevailing cases concerning implied private rights of action, the *Clarke* Court observed that "[t]he difference made by the APA can be readily seen by comparing the 'zone of interest' decisions [involving the APA] with cases in which a private right of action under a statute is asserted in conditions that make the APA inapplicable." *Clarke*, 479 U.S. at 400 n.16 (citing *Cort v. Ash*, 422 U.S. 66 (1975), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979)). In the implied-right-of-action cases, the Court said, "the would-be plaintiffs [had] the threshold burden of showing that they were 'one of the class for whose *especial* benefit the statute was enacted'" – which, the Court continued, was "[c]learly ... more ... than a showing that their interests were arguably within the zone protected or regulated" by the statute under which they were suing. *Id.* (quoting *Cort*, 422 U.S. at 78).

The Court should take the opportunity in this case to make explicit what is perhaps only implicit in *Clarke* and *Bennett*: That outside the APA – whose "generous review provisions" have at times been invoked to justify a loose zone-of-interests analysis – the test *requires evidence of a specific congressional intent to protect the would-be plaintiff*. The analogy drawn (if only obliquely) in *Clarke* between the non-APA zone-of-interests test and the approach to implying private rights of action is spot-on. Both are driven by fundamental separation-of-powers principles. For its part, "standing doctrine," as Justice Stevens has accurately summarized, is plainly "rooted in separation-of-powers concerns." *Steel Co. v. Citizens for a Better Environment*, 523

U.S. 83, 125 n.20 (1998) (Stevens, J., dissenting). The Court explored the connection at some length in *Allen v. Wright*, observing that the "case or controversy" requirement - and particularly the standing doctrine - "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." 468 U.S. 737, 750 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (standing is "a principle fundamental to the separate and distinct constitutional role of the Third Branch"). More particularly relevant here, the Court has emphasized that prudential standing doctrine specifically - and, more specifically still, the zone-of-interests test - is "'founded in concern about the proper - and properly limited - role of the courts in a democratic society.'" *Bennett*, 520 U.S. at 162 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

So, too, this Court's implied-right-of-action decisions have gradually - but decisively - embraced Justice Powell's separation-of-powers-based view that "Congress ... should determine when private parties are to be given causes of action under legislation it adopts" and, accordingly, that "[w]hen Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting). Thus, this Court in *Alexander v. Sandoval*, emphasized a "particular understanding of the genesis of private causes of action." 532 U.S. 275, 286 (2001). Specifically, the Court said, because "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress," "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* To that end, this Court clarified, the question whether or not Congress actually, affirmatively intended to create a private remedy is "determinative." *Id.*

Importantly for present purposes, in the implied-right-of-action context, congressional intent is essential not only to determining *whether* to permit private suits at all, but also to determining *who* should be permitted sue. Specifically, this Court's cases (the very cases alluded to in footnote 16 of *Clarke*) have emphasized that a key consideration in recognizing a private remedy is whether the statute in question was enacted for the benefit of "a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. Indeed, even in the heyday of implied private rights, the decisive question was whether the statute at issue "was enacted for the benefit of a special class" of beneficiaries; if so, a court could recognize a remedy, but only "for members of that class." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374 (1982); *see also, e.g., Cort*, 422 U.S. at 78 (whether "the plaintiff [is] 'one of the class for whose *especial* benefit the statute was enacted'" (quoting *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916))). "The question" under these decisions, in sum, "is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra Club*, 451 U.S. 287, 294 (1981).

This Court should now formalize the implied-right-of-action analogy it suggested nearly 20 years ago in *Clarke*. It should hold that, as applied outside the context of the APA, the zone-of-interests test requires a would-be plaintiff (here, McDonald) to show that in enacting the statute that forms the basis of his suit (here, §1981) Congress clearly and specifically intended to protect someone in his shoes.

III. By Any Measure, McDonald Is Not Within the Zone of Interests Congress Intended To Protect in Section 1981.

However one measures the zone of interests Congress intended to protect in §1981 - whether somewhat loosely, as in the APA cases, or more strictly, in accordance with the

implied-right-of-action analogy sketched in *Clarke* – McDonald lacks standing to sue. In relevant part, §1981, which was enacted as part of the landmark Civil Rights Act of 1866, provides that "[a]ll persons ... shall have the same right ... *to make and enforce contracts* ... as is enjoyed by white citizens ...." 42 U.S.C. §1981(a) (emphasis added). Who, exactly, is covered by those terms? Who has (or can get) the "right to make and enforce contracts" that the statute protects? As every first-year law student learns, there are really only two ways that one can acquire contract rights: first, and most obviously, one can be an actual party (or formal assignee) to the contract in question; second, at least under modern doctrine, a non-party can acquire contract rights if he is what the law calls an "intended third-party beneficiary."

McDonald fits neither description. He is not himself a party to any of the contracts at issue here, nor is he an intended third-party beneficiary of those contracts. As a result, he is for present purposes a stranger to the contracts and plainly outside the zone of interests protected by §1981.

A. McDonald Lacks Standing as a Contract Party.

The courts of appeals that have addressed the issue head-on (with the obvious exception of the Ninth Circuit) have all held that only the contracting parties themselves have standing to sue under §1981. In so holding, those courts have pointed to §1981's language – "make and enforce contracts" – as the first and best indicator of Congress's intent with respect to the protected zone of interests. Thus, facing a claim (like the one here) by a company's sole shareholder that Wal-Mart had terminated the company's contract for discriminatory reasons, Judge Boudin, writing for the First Circuit, concluded that "[n]othing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely *affiliated* – as an owner or employee – with a contracting party that is discriminated against by the company that made the contract." *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999). Rather,

Judge Boudin wrote, §1981's "statutory language ... precludes" a §1981 claim by a sole shareholder "unless he also ha[s] a contract" with the defendant. *Id.* The shareholder "had no claim of any kind under section 1981 because he had no contract." *Id.*

The Seventh Circuit's decision in *Kyles v. J.K. Guardians Security Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000), is to the same effect. There, the court held that §1981's language "protects the right to enter into and preserve a contractual relationship, period." *Id.* at 303. "The terms of 1981 are more narrow" than those of other civil-rights statutes in that §1981 "protects the contractual relationship itself." *Id.* Accordingly, the court said, "[t]he class of persons who may bring suit is ... limited to persons who actually wish to enter into (or remain in) that relationship." *Id.* Because the plaintiffs before it – employment "testers" who were obligated to reject any job offer made to them – had no intention "to enter into a contract" with the defendant, the court found that they had no §1981 standing. *Id.* at 302. *See also The Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (only the "party seeking to contract with the defendants" had §1981 standing).

That McDonald is not formally a party to the contracts at issue here is clear enough. McDonald's own complaint repeatedly recognizes that the contracts, instead, are between Domino's and JWM Investments, Inc., McDonald's company. *See* Pet. App. 12 (contracts were "between JWM and Domino's"); *id.* at 14 (same); *id.* ("contract with JWM"). McDonald's sole connection to the contracts was "in his capacity as President of JWM," in which he admits he was "acting for JWM." *Id.* at 11. Accordingly, if, as the courts of appeals seem to have assumed, a proper §1981 plaintiff must himself have been a party to the contract that forms the basis of his claim, McDonald lacks standing.

B. McDonald Lacks Standing as a Third-Party Beneficiary.

The court of appeals' decisions, conferring §1981 standing only on those who formally enter into contractual relationships, make sense. An ordinary understanding of the statutory phrase "make and enforce contracts" would seem, at the very least, to focus on the actual parties to those contracts. There remains, however, the possibility that one who is not formally a party to a contract, but is nonetheless an intended third-party beneficiary of that contract, might have standing to sue under §1981. Although, apparently, no appellate court has addressed that issue head-on, a few scattered decisions seem to assume that third-party-beneficiary status could be sufficient to confer §1981 standing. *See Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974); *Jones v. Local 520, Int'l Union of Operating Engineers*, 603 F.2d 664, 665 (7th Cir. 1979). Careful analysis reveals that assumption to be unfounded.

As we will explain, third-party-beneficiary doctrine cannot aid McDonald here, for two reasons. First a thorough review of the history strongly indicates that third-party rights were not within the contemplation of Congress when it enacted §1981 in 1866 – and are thus not part of the zone of interests protected by that statute. Second, and in any event, McDonald is not a third-party beneficiary of the Domino's-JWM contracts in question.

1. Third-Party Beneficiaries Are Not Within the Zone of Interests Congress Intended To Protect in Section 1981.

On their face, §1981's terms – at least as those terms are presently understood – might suggest an intention to cover third-party beneficiaries. Section 1981's core provision, again, protects the right to "make and enforce contracts." Only contracting parties, of course, can "make" a contract. But at least under modern law, an intended third-party

beneficiary can "enforce" contractual duties made by the contracting parties specifically for his benefit. *See Restatement (Second) Contracts* §304 (1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, *and the intended beneficiary may enforce the duty.*" (emphasis added)); 13 *Williston on Contracts* §37:1, at 9 (R. Lord, ed., 4th ed. 2000) ("Under [third-party beneficiary] doctrine, an individual who is not a party to a contract can enforce the contract under certain circumstances."). The same, seemingly, goes for Congress's 1991 elaboration on the meaning of the phrase "make and enforce" to include, for instance, the "performance, modification, and termination of contracts." 42 U.S.C. §1981(b). While only contracting parties may "modif[y]" or "terminat[e]" an existing contract, *cf. Restatement* §311(2), an intended third-party beneficiary does, in certain circumstances, have a right to demand contract "performance," *see id.* §302(1).

The inclusion of intended third-party beneficiaries within §1981's zone of interests, however, is not so straightforward. As noted above, whatever its precise contours, the zone-of-interests test is fundamentally a function of "congressional intent." *Clarke*, 479 U.S. at 394. The question, therefore, is not whether §1981 can plausibly be read today – even if anachronistically – to cover third-party beneficiaries; the question, instead, is whether the 39th Congress, which enacted what is now §1981(a) as part of the Civil Rights Act of 1866, itself affirmatively intended to protect third parties.

Section 1981's language, in and of itself, does not tell us much about whether Congress intended to protect third-party beneficiaries' rights. Nor, as best we can tell, is there any smoking gun in the Civil Rights Act's legislative history that explains precisely what kinds of contract rights Congress intended to cover.[1] In the absence of any compelling

---

[1] While there are a number of passing references to the Act's "make and enforce contracts" clause, *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 475,

evidence in those traditional sources, it makes sense to consider in some detail the state of general contract law as it existed circa 1866 to determine whether it can simply be assumed that the 39th Congress intended to include non-parties within the scope of the Act's "make and enforce contracts" provision. As we explain, it is not at all clear that such an assumption is warranted.

Justice Scalia (joined by Justice Kennedy) has waded into these historical waters before. In a concurring opinion in *Blessing v. Freestone*, Justice Scalia observed that "[u]ntil relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it ...." 520 U.S. 329, 349 (1997). More to the point for present purposes, citing an amicus brief filed in that case, Justice Scalia noted that "[t]his appears to have been the law at the time §1983 was enacted" in 1871 – just five years after the enactment of §1981 in 1866. *Id.* at 350. The detailed discussion that follows tends to confirm Justice Scalia's admittedly tentative assessment.

"Under the traditional common-law rule, only parties in privity of contract could sue on the contract"; third parties were treated as strangers to the contract, without any enforcement rights whatsoever. 13 Williston §37:1, at 5. Obviously, things have changed; the third-party beneficiary rule is a staple of modern American contract doctrine.[2] The

476, 478, 598 (Jan. 29-Feb. 2, 1866), there are apparently only three substantive discussions: one involving the clause's application to mixed-race marriage contracts, *see id.* at 505-06 (Jan. 30, 1866); another concerning the clause's application to Indians, *see id.* at 571-72 (Feb. 1, 1866); and another considering whether the Act gave the federal courts the power to fashion a federal common law of contracts or, instead, simply required courts to enforce state contract law without regard to race, *see id.* at 1781-82 (Apr. 5, 1866).

[2] The same, interestingly, cannot be said for other common-law countries. Until 1999, England steadfastly rejected the third-party beneficiary rule. *See* Contracts (Rights of Third Parties) Act 1999 (Eng.). Canada seems to have acknowledged third-party enforcement only in 1992. *See*

questions for present purposes, given the focus on congressional intent, are how (and when) we got from A to B, and, more particularly, whether, given the legal landscape as it existed in 1866, the 39th Congress can be assumed to have intended to weave third-party beneficiary principles into §1981's "make and enforce contracts" clause. Given the history as we understand it, the answer to the latter question, in all probability, is no.

There are several useful accounts of the history of the third-party-beneficiary rule. *See, e.g.*, Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109 (1985); M.H. Hoeflich & E. Perelmuter, *The Anatomy of a Leading Case:* Lawrence v. Fox *in the Courts, the Casebooks, and the Commentaries*, 21 U. Mich. J. L. Ref. 721 (1988); Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case*, 9 Law & Hist. Rev. 327 (1991); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358 (1992). While these accounts diverge at various points along the way, there are important areas of general agreement.

As an initial matter, there is the acknowledged course of the rule's evolution in England. During the seventeenth and eighteenth centuries, courts clearly permitted at least some third parties to sue on contracts made for their direct benefit. *See Dutton v. Poole*, 83 Eng. Rep. 523 (K.B. 1677); *Martyn v. Hind*, 98 Eng. Rep. 1174 (K.B. 1776). But by the mid-nineteenth century attitudes had changed – so much so that Chitty's 1842 contracts treatise could report that although third-party-beneficiary cases "seem to have been contradic-

London Drugs Ltd. v. Kuehne & Nagel Int'l Ltd. [1992] 3 SCR 299 (Can. Supr. Ct.). And despite rumblings in Australia's courts, that country has yet to embrace third-party-beneficiary doctrine. *See* John Adams, *Digital Age Standard Form Contracts Under Australian Law*, 13 Pac. Rim L. & Pol'y J. 503, 519-20 (2004).

tory in the past," it was "now a rule of law" that "the consideration for a promise must move from the plaintiff" himself and that a third party, as such, had no enforceable rights. Joseph Chitty, Jr., *Contracts* 53 (London 1842). As Professor Karsten has summarized, save for two outliers, every third-party-beneficiary plaintiff in England between 1790 and 1861 was "turned away on the grounds that no consideration had moved from the plaintiff and that he or she was not privy to the contract." Karsten, *supra*, at 337 & n.49 (collecting cases); *see also Hybart v. Parker*, 140 Eng. Rep. 1063, 1065 (C.P. 1858) ("[I]f it be a hardship" that a third party cannot sue, "the remedy must be sought at the hands of the legislature."); *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842) (requiring privity); *Langridge v. Levy*, 150 Eng. Rep. 863 (Ex. 1837) (same).

This decided English trend away from third-party rights during the nineteenth century culminated in *Tweddle v. Atkinson*, 121 Eng. Rep. 762 (Q.B. 1861), which expressly repudiated the earlier cases in favor of a hard-and-fast rule forbidding suit by non-parties. As Judge Crompton explained there:

> The modern cases have, in effect, overruled the old decisions; they shew that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purposes of suing upon it for his own advantage, and not a party to it for the purpose of being sued.

Id. at 763. *Tweddle* was and is "viewed as the leading case in England." Karsten, *supra*, at 337; *accord* Guenter Treitel, *Some Comparative Notes on English and American Contract Law*, 55 SMU L. Rev. 357, 358 (2002) ("[T]he refusal of the English common law, in general, to recognise" third-party beneficiary rights is "associated with the case of *Tweddle v. Atkinson*."). As will become clear, the doctrinal shift that *Tweddle* represents manifested itself in this country, as well.

American third-party-beneficiary doctrine is typically traced to the New York Court of Appeals' plurality decision in *Lawrence v. Fox*, 20 N.Y. 268 (1859). *See, e.g.*, 13 Williston §37:1, at 8 (calling *Lawrence* "the leading United States decision"); Treitel, *supra*, at 358 ("The early development of the American third party beneficiary doctrine is usually associated with the New York case of *Lawrence v. Fox*."); Hoeflich & Perelmuter, *supra*, at 721, 727 (calling *Lawrence* the "leading case" and the "landmark case"). The facts of *Lawrence* are simply stated: One Holly, admitting that he owed Lawrence $300, lent the money to Fox, who, in turn, promised that he would repay it Lawrence the next day; he did not, and Lawrence, a non-party to the Fox-Holly agreement, sued on the contract. The New York court allowed the suit, declaring that when "a promise [is] made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach." *Lawrence*, 20 N.Y. at 275.

Many legal historians are firmly of the view that *Lawrence* "began the career of the so-called third-party beneficiary contract." Lawrence M. Friedman, *A History of American Law* 534 (2d ed. 1985). The decision, they say, "departed significantly from nineteenth-century contract doctrine" and, more specifically, "represented the first time an American court permitted a third-party beneficiary to recover in a commercial context." Hoeflich & Perelmuter, *supra*, at 726. To these commentators, the New York court "defied the prevailing rules of contractual liability" by holding that "a third-party - someone who was not a party to the contract, had no obligation under it, and had given nothing in exchange for the right being claimed - could, nevertheless, enforce it." Waters, *supra*, at 1111 (abstract); *accord id.* at 1116 (*Lawrence* announced "an idea ... plainly at odds with the received wisdom of its time"); *id.* at 1140 ("great departure from prior law"). In fact, some say, "the mainstream of American contract law at the time of *Lawrence v. Fox*, and" - significantly for present purposes - "for at least half a century thereafter, was more nearly atomistic [than altruis-

tic], jealously guarding the autonomy of contracting parties by insisting upon 'privity of contract' between plaintiff and defendant." *Id.* at 1112.

Plainly, if the view of *Lawrence* as legal bombshell is correct, then §1981 should not be read to protect third-party rights. It is almost inconceivable that an idea born in 1859 could have become so woven into the fabric of American law by 1866 that Congress could be presumed to have embraced it *sub silentio*. But, in fairness, others are less certain that *Lawrence* was such a bolt out of the blue. *See* Eisenberg, *supra*, at 1362-64 (*Lawrence* "was not very remarkable for its time"); Karsten, *supra*, at 333 (*Lawrence* "did not 'begin the career' of the third-party beneficiary rule"). And, in fact, it seems clear enough from the historical record that mid-nineteenth century law was not monolithically opposed to third-party claims. Professor Karsten, for instance, has noted several jurisdictions that, in the Civil War era (and even before *Lawrence*), allowed third-party suits. *See* Karsten, *supra*, at 340 n.67, 344. Antebellum courts in Illinois, for instance, seem to have been uniform in allowing third-party beneficiaries to sue. *See Bristow v. Lane*, 21 Ill. 194, 197-98 (1859). Ohio and Maine, too, apparently permitted third-party-beneficiary suits in the years leading up to the Civil War. *See Crumbaugh v. Kugler*, 3 Ohio St. 544 (1854); *Bohanan v. Pope*, 42 Me. 93 (1856). In South Carolina, at least two lower-court decisions in the 1840s permitted third parties to sue and recover. *See Thompson v. Gordon*, 3 Strob. 196 (S.C. Ct. App. 1848); *Brown v. O'Brien*, 1 Rich. 268 (S.C. Ct. App. 1845). And Alabama courts likewise permitted third-party suits in clear terms – at least where the would-be plaintiffs were creditor, as opposed to donee, beneficiaries. *See Shotwell v. Gilkey's Administrators*, 31 Ala. 724 (1858). Karsten also lists California and Kentucky among the States allowing third-party suits, although the decisions cited either referred to the third-party beneficiary rule only obliquely, and then only in dicta, *see Barringer v. Warden*, 12 Cal. 311 (1859); *Lucas v. Chamberlain*, 47 Ky. 276 (1847), or seemed to limit the

rule's reach to contracts involving close family members, *see Clarke v. McFarland's Executors*, 5 Dana 45 (Ky. Ct. App. 1837).

The trick, then, is in assessing the overall state of third-party-beneficiary doctrine circa 1866 – specifically, with an eye to determining whether the 39th Congress (having said nothing one way or the other) can simply be assumed to have intended to bring third-party rights within the ambit of §1981's "make and enforce contracts" language. The historical record will not support that kind of inference. Even allowing for the fact that some American jurisdictions were permitting third-party suits during the mid-nineteenth century, a number of others were not.

Indeed, in keeping with the trend in England – which, as noted above, culminated in the 1861 decision in *Tweddle v. Atkinson* – there was a substantial (and seemingly swelling) body of mid-nineteenth-century American precedent denying third parties the right to sue. *See* Karsten, *supra*, at 344-45 ("But if a few states had considered and rejected the new trend in English doctrine regarding third-party beneficiaries in the late 1840s and 1850s, other states ... were moving simultaneously to adopt the new English reasoning."). Among the States refusing to recognize third-party claims –

- **Massachusetts:** Although a few early cases allowed third-party suits, *see, e.g., Felton v. Dickinson*, 10 Mass. 287 (1813), by mid-century the courts had firmly rejected third-party-beneficiary doctrine in favor of a strict privity rule, *see Mellen v. Whipple*, 67 Mass. 317 (1854); *Dow v. Clark*, 73 Mass. 198, 201 (1856).[3]
- **New Hampshire:** Nineteenth-century cases overwhelmingly rejected third-party-beneficiary suits. *See, e.g., Butterfield v. Hartshorn*, 7 N.H. 345 (1834);

[3] Indeed, Massachusetts did not embrace the third-party-beneficiary rule until 1979. *See Choate, Hall & Stewart v. SCA Servs., Inc.*, 392 N.E.2d 1045, 1049-51 (Mass. 1979).

Warren v. Batchelder, 15 N.H. 129 (1844); *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N.H. 249 (1875); *Land v. Henry*, 54 N.H. 57, 64 (1873).

- **Virginia:** Virginia courts early on refused to allow common-law contract actions by third parties, *see Ross v. Milne*, 12 Leigh 204 (Va. 1841), and apparently held to that rule throughout the nineteenth century, *see Jones v. Thomas*, 62 Va. 96 (1871); *Stuart v. James River & Kanawha Co.*, 65 Va. 294 (1874); *Willard v. Worsham*, 76 Va. 392 (1882).
- **Vermont:** Nineteenth-century decisions established that suits could be maintained only by contracting parties. *See, e.g., Pangborn v. Saxton*, 11 Vt. 79 (1839); *Hall v. Huntoon*, 17 Vt. 244 (1845); *Fugure v. Mutual Soc'y of St. Joseph*, 46 Vt. 362 (1874).
- **Pennsylvania:** Early cases allowed common-law contract suits by third-party beneficiaries, *see Hind v. Holdship*, 2 Watts 104 (Pa. 1833), but gave way to a mid-nineteenth-century rule decisively rejecting third-party claims, *see Blymire v. Boistle*, 6 Watts 182 (1837); *Finney v. Finney*, 16 Pa. 380 (1851).
- **Michigan:** It was settled in the mid-nineteenth century that a third party could not sue even on a contract made specifically for his benefit. *See Brown v. Hazen*, 11 Mich. 219 (1863); *Pipp v. Reynolds*, 20 Mich. 88 (1870).
- **North Carolina:** Although an 1852 case seemed to leave the door to third-party rights cracked, *see Carroway v. Cox*, 44 N.C. 173 (1852), a decision eight years later closed it, *see Styron v. Bell*, 53 N.C. 222 (1860).
- **Missouri:** While decisions during the 1840s treated the issue as unsettled, *see Bank of Missouri v. Benoist*, 10 Mo. 520 (1847), and were themselves somewhat contradictory, *compare Belt v. McLaughlin*, 12 Mo. 433 (1849) (allowing third-party suit), *with Jones v. Miller*, 12 Mo. 408 (1849) (refusing), by 1858 Missouri courts had adopted a strict privity requirement, *see Manny v. Frazier's Administrator*, 27 Mo. 419 (1858); *Page v. Becker*, 31 Mo. 466 (1862).

So, if we're just counting mid-nineteenth-century noses, the case law reveals something of a split, with some States permitting third-party suits, but with a number of others (including influential States like Massachusetts, New Hampshire, Virginia, and Pennsylvania) refusing. At the very least, it seems safe to say that the reported decisions were not so *supportive* of third-party rights that the 39th Congress could be assumed, on the basis of the case law alone, to have incorporated into §1981's "make and enforce contracts" clause anything like modern third-party-beneficiary doctrine.

Additionally, there is more to the story than nose-counting. The common law is not static, of course, but dynamic, and in that respect there are two trends worth noting – both of which undercut any assertion that Congress through its silence necessarily intended to protect third-party rights in §1981. First, even those with a more bullish view of nineteenth-century third-party-beneficiary doctrine admit that during the relevant period here – the years leading up to and including the mid-1800s – there was a marked drift in the law *away* from recognition of third-party-beneficiary rights. As noted above, despite some early third-party successes in the seventeenth and eighteenth centuries, between 1790 and 1861 English courts overwhelmingly rejected the claims of third-party plaintiffs who came before them. *See supra* at 18. So, too, the decided trend in America – perhaps expectedly, trailing England by a few years – seems to have been against third-party rights. According to Professor Karsten's research, between 1801 and 1820, state-side courts – led by those in Massachusetts and New York – typically permitted third-party suits. *See* Karsten, *supra*, at 340. But beginning in 1840, while some states (like New

York, he says, citing *Lawrence*) were "cl[inging] to the older rule," *id.* at 343, "others, including ultimately Massachusetts itself, were moving simultaneously to adopt the new English reasoning" refusing to recognize third-party rights, *id.* at 345. (Even in New York, Karsten reports, there were in 1860 already "strong undercurrents of modern doctrine tugging at the old rule's support pilings." Karsten, *supra*, at 344.[4]) As the list above shows, and as Professor Karsten's summary confirms, several other States followed similar patterns - moving during the mid-nineteenth century from a posture of recognition (or at least agnosticism) to one of stubborn refusal. *See* Karsten, *supra*, at 341-53.

Second, on the heels of this general retrenchment against the third-party beneficiary rule - indeed, "almost immediately after *Lawrence v. Fox* was decided" in 1859 - "contract law became dominated by the doctrinal reasoning of the classical contract school, as exemplified both in the cases and in the commentaries of figures like Langdell, Holmes, and Williston." Eisenberg, *supra*, at 1365. Classical contract theory - premised on formal, axiomatic rules and limited liability - was uniformly "hostile to third-party beneficiaries," and "doctrinal objections to suits by third-party beneficiaries soon began to dominate the field." *Id.* Thus, writing in 1880, Dean Langdell concluded that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise." He found the rule "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise ... [to be] so plain upon its face that it is difficult to make it plainer by argument." Christopher C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). So, too, then-practitioner Oliver Wendell Holmes lectured in 1881 that

---

[4] *See also* Hoeflich & Perelmuter, *supra*, at 736 (noting that in the years following its decision, *Lawrence v. Fox* "changed from a precedent to be reckoned with in New York, to a disfavored case").

> The fact that a consideration was given yesterday by A to B, and a promise received in return, cannot be laid hold of by X, and transferred from A to himself. The only thing which can be transferred is the benefit or burden of the promise, and how can they be separated from the facts which gave rise to them? How, in short, can a man sue or be sued on a promise in which he had no part?

Oliver W. Holmes, *The Common Law* 265 (Mark Howe ed., 1963). Under the influence of classical contract theory, "[d]uring the latter half of the nineteenth century, some American states" that had begun to follow *Lawrence*'s lead in recognizing third-party rights "reversed course." Eisenberg, *supra*, at 1367 (citing *Meech v. Ensign*, 49 Conn. 191, 209 (1881), and *Eichelberger v. Murdock*, 10 Md. 373, 379 (1857)).[5]

* * *

In the final analysis, given the state - and vector - of the case law and the post-bellum influence of classical contract theory, it seems fair to summarize by saying that "[a]lthough the seeds of the third-party beneficiary rule were sown in the middle of the nineteenth century, its growth is a twentieth-century phenomenon." Waters, *supra*, at 1149 n.145 (citing Lawrence M. Friedman, *Contract Law in America* 11-12 (1965)). Indeed, even Professor Eisenberg, himself a believer that the seeds might have been sown somewhat earlier, has acknowledged that "[t]he modern law of third-party beneficiaries did not arise until early in this century and did not

---

[5] The federal courts, too, were feeling the effects of the retrenchment. In *Hendrick v. Lindsay*, this Court noted offhandedly that "the right of a party to maintain assumpsit on a promise not under seal, made by another for his benefit, although much controverted, is now the prevailing rule in this country." 93 U.S. 143, 149 (1876). Only two years later, however, the Court seemed to limit severely creditor-beneficiary suits to those brought on equity-based theories. *See National Bank v. Grand Lodge*, 98 U.S. 123, 124-25 (1878). "The federal courts thereafter held to this rule consistently throughout the nineteenth century." Karsten, *supra*, at 354.

begin to mature until the early 1930s." Eisenberg, *supra*, at 1360; *see also* Hoeflich & Perelmuter, *supra*, at 735 (it is only "within the past several decades" that "the doctrine of *Lawrence v. Fox* has won a complete triumph"). Against that historical backdrop (and, again, without any apparent legislative history to suggest a contrary conclusion), any assumption that the members of the 39th Congress necessarily intended to incorporate third-party beneficiary rules into §1981's "make and enforce contracts" clause would be dubious at best.[6]

2. McDonald Is Not a Third-Party Beneficiary of the Domino's-JWM Contracts.

McDonald would not have §1981 standing based on any kind of third-party-beneficiary theory, in any event. Even assuming that §1981's "make and enforce contracts" provision could be understood to incorporate modern third-party doctrine, McDonald cannot reasonably be viewed as an intended third-party beneficiary of the contracts in question. McDonald's theory here, of course, is that because he has suffered "personal injury," he is entitled to sue on the contracts. *See supra* at 5. But courts applying the modern

[6] The considerably advanced state of American third-party-beneficiary law in 1991 should not affect this conclusion. When Congress enacted Section 101 of the Civil Rights Act of 1991, it did so not with any thought about third-party-beneficiary rights (one way or the other) but, rather, for the purpose of overruling this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Congress's purpose, specifically, in statutorily defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. §1981(b), was to ensure that §1981's basic prohibition on discrimination in contracting applied to post-formation claims. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304-06 & n.6 (1994); H.R. Rep. No. 102-40(I), at 89-93 (Apr. 14, 1991) ("overturn," "overrule" *Patterson*); H.R. Rep. No. 102-40(II), at 36-37 (May 17, 1991) (same). There is no discernible congressional intent underlying the 1991 Act to bring third-party beneficiaries within §1981's "zone of interests."

third-party-beneficiary rule have uniformly rejected such a freewheeling standard: As Professor Williston's treatise summarizes, "'not everyone who may benefit from the performance of a contract between two other persons, or who may suffer from its nonperformance ... is permitted to enforce the contract by court action.'" 13 Williston §37:7, at 29 (quoting *Martin v. Edwards*, 548 P.2d 779, 784-85 (Kan. 1976)). The reason is straightforward: "Because the class of third parties potentially benefited by the performance of any particular contract" – or, again, injured by its breach – "is so far ranging, a failure to limit the categories of protected beneficiaries would result in virtually every contract being enforceable by virtually anyone." *Id.* at 28.

The contracting parties' "intent is the principal touchstone for determining whether a third party beneficiary contract exists." *Id.* §37:8, at 62-63; *see also Restatement* §302(1) ("intention of the parties"). Specifically, before a non-party may sue on a contract, "'"he must, at least, show that it was intended for his direct benefit," in either all or part of its contemplated performance.'" 13 Williston §37:8, at 65-66 (quoting *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927)). The requisite intent to benefit a third-party beneficiary, sufficient to give him the right to sue, can be shown in one of two ways. First, "[i]n the typical case, where the promisor has undertaken to render performance directly to the beneficiary, the intent to benefit the third party will be clearly manifested." *Id.* at 70. That, of course, is not the case here; Domino's has not covenanted to perform directly to McDonald; rather, Domino's promised "to pay JWM." Pet. App. 15.

Second, where (as here) no direct performance is contemplated, the "'one suing as a third party beneficiary has the burden of showing that the provision was for his direct benefit.'" Unless one can sustain this burden, a purported third party beneficiary will "be deemed merely incidentally benefited and will not be permitted to recover on or enforce

the agreement." 13 Williston §37:8, at 70 (quoting *Willis v. E.I. DuPont De Nemours & Co.*, 76 F. Supp. 1010, 1014 (E.D. Okla.), *rev'd on other grounds*, 171 F.2d 51 (10th Cir. 1948)). McDonald cannot "sustain [his] burden" here. The contracts at issue were not made for *his* "direct benefit." Rather, they were drawn for the benefit of Domino's and JWM: Domino's was to get four restaurant buildings (Pet. App. 11), and JWM was to get paid (Pet. App. 15).

McDonald here is, at most, what the law calls an "incidental" beneficiary - one of those "[p]ersons who are neither the promisees of a contract nor third parties to whom performance is to be rendered [who] sometimes derive a benefit from a contract's performance." 13 Williston §37:19, at 123. But, again, the "mere fact that a person who is not a party to a contract would be benefited does not make that person an intended beneficiary" entitled to sue. *Id.* at 130. And "[u]nless the third person is an intended beneficiary ... no duty to him is created." *Restatement* §302 cmt.(e).

McDonald can be expected to argue that his status as JWM's sole shareholder, in and of itself, makes him an intended third-party beneficiary of the Domino's-JWM contracts. But the case law is directly to the contrary. *See, e.g., Lee v. Mitchell*, 953 P.2d 414, 426 (Or. Ct. App. 1998) ("The mere fact that plaintiffs own half of the stock of the corporation does not mean that those who deal with the corporation intend to benefit plaintiffs as individuals; [the corporation] is a separate entity from its owners."); *Amesco Exports, Inc. v. Associated Aircraft Mfg. & Sales, Inc.*, 977 F. Supp. 1014, 1016 (C.D. Cal. 1997) ("[T]he court should not even find that where the corporation only has one shareholder, as here, that the shareholder is a third party beneficiary of any contract of which the corporation is a signatory because that would defeat the purpose of creating the corporation and using it as the signatory.") (cited in 13 Williston §37:19, at 128 n.58), *vacated on other grounds*, 87 F. Supp. 2d 1013 (C.D. Cal. 1997). In that respect, common-law

contract doctrine squares precisely with the decisions of the First and Tenth Circuits holding that even a "sole shareholder" of a corporate contracting party may not sue under §1981 unless he, too, is a party to the contract. *The Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d 1065, 1070 (10th Cir. 2002); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 10 (1st Cir. 1999).

Nor, of course, would employee status (there is no indication in the record that McDonald is, in fact, an employee of JWM) of its own force make McDonald an intended third-party beneficiary. *See, e.g., Taylor v. Facility Constructors, Inc.*, 360 F. Supp. 2d 887, 894 (N.D. Ill. 2005) ("[N]othing about the language or circumstances [of the contract] even suggests any intention to create a benefit for ... employees."); *Baidee v. Brighton Area Schs.*, 695 N.W.2d 521, 540 (Mich. Ct. App. 2005) ("'[C]ontractors, subcontractors, and their employees are generally held not to be the third-party beneficiaries of the contract between the general supervisory contractor and the project owner.'"); *Pelletier v. Sordoni/Skanska Constr. Co.*, 825 A.2d 72, 86 (Conn. 2003) (same, as to employees); *Howell v. Ketchikan Pulp Co.*, 943 P.2d 1205, 1207 (Alaska 1997) (same).

Because McDonald is neither a party to nor an intended third-party beneficiary of the Domino's-JWM contracts at issue, he has no standing to sue under §1981.

IV. McDonald's Proposed Construction of Section 1981 Would Dramatically Expand Liability and Trigger a Flood of New Suits.

We close where we began, with the hypothetical action brought against a state DOT by an employee of a company hired to build a public road. *See supra* at 1-2. That is precisely where McDonald's theory of this case leads - to §1981 lawsuits brought by individuals who are altogether removed from the "contract[ing]" process that §1981 protects but who, through various twists and turns, can show some incidental injury from a contract breach.

But surely, it cannot be the law that anyone (employee or otherwise) who is in any way affected by the termination of a contractual relationship can sue under §1981. Were it so, there would be no limit to defendants' potential liability. Indeed, it is that very threat of limitless liability, at least in part, that drives modern third-party-beneficiary doctrine. To repeat Professor Williston's warning: "Because the class of third parties potentially benefited by the performance of any particular contract is so far ranging, a failure to limit the categories of protected beneficiaries would result in virtually every contract being enforceable by virtually anyone." 13 Williston §37:7, at 28. Accordingly, it is just not enough for a would-be plaintiff to show that he would have benefited from a particular contract's performance, or that he has been injured by its breach; rather, he must show that his benefit was one specifically contemplated and intended by the contracting parties.

Likewise, the same threat of limitless liability (or at least litigation) is one of the driving forces behind the prudential standing doctrine's "zone of interests" requirement. Recognizing that there is a very real "potential for disruption inherent in allowing every party adversely affected" by a purported statutory violation to go to court, *Clarke*, 479 U.S. at 397, this Court has emphasized the need for some meaningful restriction - over and above Article III's injury-in-fact requirement - on plaintiffs who can sue under a particular statutory provision.

McDonald's position here - which would allow suit by anyone "personal[ly] injur[ed]" by an allegedly racially-motivated breach of contract - has the potential to blow the doors right off the hinges of §1981 liability.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's judgment.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7300

July 14, 2005

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-593

IN THE

Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., and DEBBIE PEAR,
Petitioners,

v.

JOHN MCDONALD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNCONTESTED MOTION TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
ROBERT J. COSTAGLIOLA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS &
WILLIAMS LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

* Counsel of Record

July 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

No. 04-593

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., and DEBBIE PEAR,
Petitioners,

v.

JOHN MCDONALD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* contingent on the granting of the accompanying Motion for Leave.[1] The brief urges reversal of the Ninth Circuit's decision below and thus

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of the brief.

has been filed with the Clerk of the Court. Counsel for Respondent has filed a letter with the Clerk indicating that he does not object to participation by *amici*.

In support of their motion, EEAC and the Chamber by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound, practical programs and policies to combat employment discrimination. Its membership now comprises more than 330 of this nation's largest private sector companies, collectively employing over 20 million workers throughout the United States.

2. The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing amicus curiae briefs in cases involving issues of national concern to American business.

3. EEAC's and the Chamber's members are fully committed to the principles of nondiscrimination and equal employment opportunity. Nevertheless, as employers, they make tempting targets for lawsuits under the antidiscrimination laws, including 42 U.S.C. § 1981. Consequently, EEAC's and the Chamber's members have a direct interest in the extent to which the universe of potential discrimination suits is limited by the requirement that a plaintiff must have standing to bring an action under Section 1981.

4. EEAC's and the Chamber's members are concerned that the Ninth Circuit's decision in this case vastly expands the scope of standing under Section 1981 by holding that it extends to anyone who claims to have been injured by discrimination in a contractual relationship, even if it is not a contractual relationship to which that individual has ever been, or sought to be, a party. The decision raises the prospect of a flood of Section 1981 suits by plaintiffs alleging discrimination in contractual relationships to which they have been only tangentially related.

5. The brief explains that although Section 1981 was enacted to protect *contractual* rights, the Ninth Circuit has expanded it to encompass derivative claims by individuals against companies with which they have no contractual relationships. Thus, the decision below creates a significant new litigation threat to companies, exposing them to potential discrimination suits brought, not by their own employees or job applicants, but by virtually anyone associated with any firm with which they have had any contractual dealings.

6. Because of their members' interest in the scope of Section 1981 as applied to employment, EEAC and/or the Chamber have filed *amicus curiae* briefs in a number of cases in this Court, including *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), and *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Thus, EEAC's and the Chamber's interest in, and experience with, the issue presented for the Court's consideration in this case are both substantial and long-standing.

7. Because of their significant experience, EEAC and the Chamber are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully request that the Court grant them leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
ROBERT J. COSTAGLIOLA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS &
WILLIAMS LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

July 2005

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. A PLAINTIFF WHO NEITHER IS, NOR SEEKS TO BE, A PARTY TO A CONTRACTUAL RELATIONSHIP HAS NO STANDING TO SUE UNDER 42 U.S.C. § 1981 FOR ALLEGED DISCRIMINATION IN THAT RELATIONSHIP	7
A. Because Section 1981 Protects a Specific Right—the Right To Make and Enforce Contracts—the Class of Persons Who Can Bring Claims Under Section 1981 Is Limited to Those Who Seek To Enter Into or Remain In the Contractual Relationship at Issue	7
B. Alleged Injuries to Persons Who Neither Have Nor Seek a Contractual Relationship Lie Outside the Zone of Interests Section 1981 Protects	9
II. PRUDENTIAL PRINCIPLES WEIGH HEAVILY AGAINST EXTENDING SECTION 1981 STANDING TO PERSONS WHO ARE ONLY TANGENTIALLY RELATED TO THE CONTRACTUAL RELATIONSHIPS ON WHICH THEY BASE THEIR CLAIMS	11

TABLE OF CONTENTS—Continued

Page

A. The Party Whose Section 1981 Rights Are at Stake Is Best-Suited To Assert Any Section 1981 Claim 11

B. Prudent Concern for the Amount of Litigation in the Federal Courts Warrants Limiting Standing Under Section 1981 to Those Whose Own Rights Are at Stake 14

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES Page

Bellows v. Amoco Oil Co., 118 F.3d 268 (5th Cir. 1997) 8

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999) 8

Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S. Ct. 2301 (2004) 5, 11

General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982) 13

Gersman v. Group Health Association, Inc., 931 F.2d 1565 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *orig. opinion aff'd*, 975 F.2d 886 (D.C. Cir. 1992) 8

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 11

Gomez v. Alexian Brothers Hospital, 698 F.2d 1019 (9th Cir. 1983) 9

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 3

Guides, Ltd. v. Yarmouth Group Property Management, Inc., 295 F.3d 1065 (10th Cir. 2002) ... 9

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004) 3

Kyles v. J.K. Guardian Security Services, Inc., 222 F.3d 289 (7th Cir. 2000) 7, 8, 10, 14

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 3

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 13

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 3, 13

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 3

TABLE OF AUTHORITIES—Continued

Page

Singleton v. Wulff, 428 U.S. 106 (1976)..... 10, 12, 13, 14
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)..... 13
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)..... 13
Warth v. Seldin, 422 U.S. 490 (1975)..... 10, 11, 12

CONSTITUTIONS

U.S. Const. art. III..... 11

FEDERAL STATUTES

42 U.S.C. § 1981 ..... *passim*
42 U.S.C. § 1981(a)..... 7
42 U.S.C. § 1981(b)..... 7, 15
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 7

IN THE

Supreme Court of the United States

No. 04-593

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., and DEBBIE PEAR,
Petitioners,

v.

JOHN MCDONALD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* contingent on the granting of the accompanying Motion for Leave.[1] The brief urges reversal of the Ninth Circuit's decision below and thus

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of the brief.

supports the position of the petitioners, Domino's Pizza, LLC, *et al.*

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound, practical programs and policies to combat employment discrimination. Its membership now comprises more than 330 of this nation's largest private sector companies, collectively employing over 20 million workers throughout the United States.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

EEAC's and the Chamber's members are fully committed to the principles of nondiscrimination and equal employment opportunity. Nevertheless, as employers, they make tempting targets for lawsuits under the antidiscrimination laws, including 42 U.S.C. § 1981. Consequently, EEAC's and the Chamber's members have a direct interest in the extent to which the universe of potential discrimination suits is limited by the requirement that a plaintiff must have standing to bring an action under Section 1981.

EEAC's and the Chamber's members are concerned that the Ninth Circuit's decision in this case vastly expands the scope of standing under Section 1981 by holding that it extends to anyone who claims to have been injured by

discrimination in a contractual relationship, even if it is not a contractual relationship to which that individual has ever been, or sought to be, a party. The decision raises the prospect of a flood of Section 1981 suits by plaintiffs alleging discrimination in contractual relationships to which they have been only tangentially related.

Although Section 1981 was enacted to protect *contractual* rights, the Ninth Circuit has expanded it to encompass derivative claims by individuals against companies with which they have no contractual relationships. For example, under the decision below, Company A can be sued by an employee, shareholder or creditor of Company B, where Company B is, was, or at some time sought to be, a customer, supplier or vendor of Company A. Indeed, such individuals—who themselves have no contractual relationship with Company A—can sue Company A alleging that it discriminated against Company B, even if Company B itself does not believe that it has been discriminated against, or has settled any claims it may have had against Company A. Of course, if Company A has not discriminated against Company B, it ultimately may win the case, but only after expending significant resources to defend itself. Thus, the decision below creates a significant new litigation threat to companies, exposing them to potential discrimination suits brought, not by their own employees or job applicants, but by virtually anyone associated with any firm with which they have had any contractual dealings.

Because of their members' interest in the scope of Section 1981 as applied to employment, EEAC and/or the Chamber have filed *amicus curiae* briefs in a number of cases in this Court, including *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), and *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

Thus, EEAC's and the Chamber's interest in, and experience with, the issue presented for the Court's consideration in this case are both substantial and long-standing.

STATEMENT OF THE CASE

This case arose on a complaint filed by John McDonald against Domino's Pizza claiming that McDonald suffered financial loss, emotional distress, and other personal damages as a result of Domino's alleged failure to perform certain obligations under contracts Domino's had with a corporation called JWM Investments, Inc. ("JWM"). The contracts, which called for construction of several restaurants for Domino's in Las Vegas, Nevada, were solely between Domino's and JWM. McDonald was not a party to the contracts, although he was JWM's president and sole shareholder. Nevertheless, McDonald filed this action solely in his own behalf.

McDonald brought this suit under 42 U.S.C. § 1981. His complaint claims that Domino's alleged "refusal . . . to abide my contractual obligations with JWM [was] due to racial animus towards McDonald," who is African-American. Pet. App. 14.[2]

The district court dismissed the complaint on the ground that McDonald lacked standing to sue under 42 U.S.C. § 1981 for an alleged violation of the civil rights of JWM. The court reasoned that "[b]y its terms, section 1981 protects the contractual relationship itself and therefore limits the class of persons who may sue under section 1981 to persons in the contractual relationship." Pet. App. 5. Since McDonald was not party to the contractual relationship between Domino's and JWM, the district court concluded that he could not "step

[2] "Pet. App." references are to the appendix filed with the petition for writ of certiorari.

into the shoes of the corporation and assert [a Section 1981] claim personally." Pet. App. 7.

The Ninth Circuit reversed. The court of appeals held that, even though the Domino's contracts were with JWM and not with McDonald himself, McDonald nonetheless could sue Domino's under Section 1981 for discrimination in the contractual relationship "insofar as he seeks recovery of individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc." Pet. App. 2. The Ninth Circuit essentially acknowledged that its decision conflicts with decisions of other circuits holding that standing under Section 1981 requires a contractual relationship. *Id.* This Court granted Domino's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

As most lower courts, other than the Ninth Circuit, have correctly recognized, a person cannot have standing to sue under 42 U.S.C. § 1981 for alleged discrimination in a contractual relationship to which he is not a party and does not seek to be a party. Section 1981 protects a specific right—the right to make and enforce contracts free from racial discrimination. A plaintiff who has not made, or at least attempted to make, a contract cannot properly claim that any right of *his* under Section 1981 is violated when the defendant rejects, terminates or otherwise interferes with a contract with some third party. If anyone's Section 1981 rights are at stake in this situation, it is the third person's, not the plaintiff's. To accord a plaintiff standing in such circumstances violates, at a minimum, the "general prohibition on a litigant's raising another person's legal rights . . . and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 2309 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The importance of reaffirming these prudential limitations on standing in the Section 1981 context is underscored by a consideration of the horrendous implications of disregarding them, as the Ninth Circuit did in this case. Contracts are the principal means by which companies do business. Every day, companies throughout the nation propose, accept, reject, modify, amend, enforce, extend, rescind, cancel and terminate literally millions of business contracts. Most of these transactions have potential consequences not only for the immediate contracting parties, but also for others, including shareholders, employees, subcontractors, suppliers, customers, landlords, tenants, creditors, insurers and countless others who do business directly or indirectly with the contracting companies.

When a company loses a business contract, its shareholders may suffer a loss in stock value; its employees may lose work and earnings; firms that do business with it may lose money and opportunities. Although none of these affected individuals was a party to the principal contract, any or all of them could claim to have suffered, to use the Ninth Circuit's phrase, "individual injuries separate and distinct from contract damages suffered by [the company that lost the contract]." Pet. App. 2. Thus, under the decision below, any and all of these individuals could have standing to bring Section 1981 suits against the other company involved, alleging that it acted with discriminatory animus.

Thus, to sustain the Ninth Circuit's holding would, in effect, convert Section 1981 from a guarantee of equal treatment for persons who engage in contractual relationships into an open invitation to file lawsuits by anyone and everyone tangentially related to any soured business transaction that they believe has caused them some loss or harm. This Court should not allow Section 1981 litigation to be expanded so far beyond the zone of interests the statute was designed to protect.

ARGUMENT

I. A PLAINTIFF WHO NEITHER IS, NOR SEEKS TO BE, A PARTY TO A CONTRACTUAL RELATIONSHIP HAS NO STANDING TO SUE UNDER 42 U.S.C. § 1981 FOR ALLEGED DISCRIMINATION IN THAT RELATIONSHIP

A. Because Section 1981 Protects a Specific Right—the Right To Make and Enforce Contracts—the Class of Persons Who Can Bring Claims Under Section 1981 Is Limited to Those Who Seek To Enter Into or Remain In the Contractual Relationship at Issue

Unlike Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, which broadly proscribes discrimination because of race, color, religion, sex, or national origin in all aspects of employment, the statute at issue in this case, 42 U.S.C. § 1981, focuses solely on one specific type of relationship—*i.e.*, the contractual relationship. Section 1981 guarantees individuals the right to "make and enforce contracts" free from discrimination because of race. 42 U.S.C. § 1981(a). This guarantee covers "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). By its own terms, however, Section 1981's protection does not extend beyond the limits of the contractual relationship itself.

The Seventh Circuit put it concisely: "Section 1981 . . . protects the right to enter into and preserve a contractual relationship, period." *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000). "The class of persons who may bring suit [under Section 1981] is therefore limited to persons who actually wish to enter into (or remain in) that relationship." *Id.* at 303. Thus, the Seventh Circuit

concluded that plaintiffs who applied for jobs as "testers" in an effort to detect hiring discrimination, without any intention of actually accepting employment with the defendant-employers, lacked standing to sue under Section 1981, because "in terms of the essential right that section 1981 protects—the right to make and enforce a contract—[the plaintiffs] suffered no injury." *Id.* at 302.

Most other federal appeals courts that have examined this issue have reached the same conclusion as the Seventh Circuit. For example, the First Circuit observed that "[n]othing in section 1981 provides a personal claim . . . to one who is merely *affiliated*—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract." *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999).

The Fifth Circuit likewise concluded that a plaintiff who had no separate contractual relationship with a defendant had no standing to sue under Section 1981 for emotional distress allegedly arising from discrimination against a corporation based on the plaintiff's race, because "the discrimination could only be asserted to invade the legal rights of the corporation and not the rights of the plaintiff." *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 277 (5th Cir. 1997). Like McDonald in the case at bar, the plaintiff in *Bellows* was the president and majority shareholder of the corporation he claimed the defendant had discriminated against. The Fifth Circuit recognized, however, that his claim was "merely derivative" of the corporation's, and hence he had "no individual section 1981 claim." *Id.* at 276. *Accord Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1567 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *orig. opinion aff'd*, 975 F.2d 886 (D.C. Cir. 1992) (President and principal shareholder of computer software firm (CSI), lacked standing to sue health maintenance organization (GHA) for discrimination under Section 1981, "because CSI, rather than

[plaintiff], suffered the alleged injury, as it was CSI that had been party to the contractual relationship with GHA"); *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (10th Cir. 2002) (President and sole shareholder of retail mall tenant had no standing to sue under Section 1981 for emotional damages she allegedly suffered because of racial discrimination against tenant by landlord and property management firm, since plaintiff suffered no violation of any distinct contractual rights of her own).

B. Alleged Injuries to Persons Who Neither Have Nor Seek a Contractual Relationship Lie Outside the Zone of Interests Section 1981 Protects

In its short, perfunctory opinion below, the Ninth Circuit acknowledged that its "sister circuits" might not agree with its holding that a person can have standing to sue under Section 1981 for discrimination in a contractual relationship to which he is not a party. Indeed, it cited the Tenth Circuit's *Guides* decision as an example of one that "reach[es] a contrary result." Pet. App. 2. Unlike the Tenth and other circuits, however, the Ninth Circuit focused solely on whether the *injury* the plaintiff was claiming to have suffered was separate and distinct from the contract damages allegedly suffered by the contracting party. It failed to complete the necessary analysis by also considering whether the *right* the plaintiff was asserting was one that comes within the zone of interest Section 1981 protects. The Ninth Circuit's earlier decision in *Gomez v. Alexian Bros. Hospital*, 698 F.2d 1019 (9th Cir. 1983), on which it relied in this case, suffers from this same error.

This oversight is fatal to the Ninth Circuit's decisions, because, as this Court has long recognized, it is essential in standing cases to consider not only whether the plaintiff is asserting a distinct injury, but also "whether the constitutional or statutory provision on which the claim rests properly can

be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (footnote omitted).

The Ninth Circuit failed to recognize that standing involves two distinct questions: First, whether the plaintiffs allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's jurisdiction under Article III of the Constitution, and second, whether as a prudential matter the plaintiffs are proper proponents of the particular legal rights on which they base their suit. *Singleton v. Wulff*, 428 U.S. 106 (1976). The Ninth Circuit considered only that McDonald alleged distinct personal injuries, without considering the specific scope of the statute under which he was suing.

The Seventh Circuit's opinion in *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289 (7th Cir. 2000), illustrates a proper analysis of the Section 1981 standing issue and, by comparison, reveals the incompleteness of the Ninth Circuit's approach. The Seventh Circuit acknowledged that the plaintiff "testers" in *Kyles* were alleging individual injuries that were separate and distinct to them—*i.e.*, humiliation and other emotional distress as a result of having allegedly encountered discrimination. 222 F.3d at 302. But unlike the Ninth Circuit, the Seventh Circuit recognized that a valid Section 1981 standing analysis cannot end there. Rather, the Seventh Circuit recognized the need to go further and consider whether the plaintiffs' alleged injuries were of a kind that is cognizable under Section 1981. It properly determined that they were not, because "in terms of the essential right that section 1981 protects—the right to make and enforce a contract—[the plaintiffs] suffered no injury." *Id.* Hence, the Seventh Circuit correctly concluded that the *Kyles* plaintiffs had no standing to assert claims under Section 1981.

Had the Ninth Circuit completed the necessary analysis in this case, it would have reached the same conclusion. Since McDonald had never made nor attempted to make any contract in his individual capacity with Domino's, he could not claim an injury within the zone of interests sought to be regulated by Section 1981. Therefore, he lacked standing to sue under that statute.

II. PRUDENTIAL PRINCIPLES WEIGH HEAVILY AGAINST EXTENDING SECTION 1981 STANDING TO PERSONS WHO ARE ONLY TANGENTIALLY RELATED TO THE CONTRACTUAL RELATIONSHIPS ON WHICH THEY BASE THEIR CLAIMS

A. The Party Whose Section 1981 Rights Are at Stake Is Best-Suited To Assert Any Section 1981 Claim

As noted above, a proper analysis of standing does not end with a determination that a plaintiff has alleged an "injury in fact" sufficient to raise a justiciable controversy under Article III. For even when the Constitution's requirements are satisfied, courts use "prudential principles" to "limit access to the federal courts to those litigants best suited to assert the particular claim." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Such principles are reflected in the "general prohibition on a litigant's raising another person's legal rights," as well as in "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, __, 124 S. Ct. 2301, 2309 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Indeed, this Court has recognized repeatedly that, to have standing, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S.

at 499. The practical necessities behind this rule are detailed in the Court's opinion in *Singleton*, 428 U.S. at 113-16. Those considerations weigh heavily against extending standing under Section 1981 to plaintiffs who have no contractual relationship with the defendant they are suing, but claim to have been harmed by the defendant's treatment of some company with which they are affiliated as, for example, employees or shareholders.

This Court explained in *Singleton* why "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of rights of third persons not parties to the litigation." 428 U.S. at 113. It noted, first, that "courts should not adjudicate . . . rights unnecessarily, and it may be that in fact the holders of [the rights in question] either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* at 113-14.

These concerns are clearly warranted in cases, like the one at bar, where Company A is sued by an employee or shareholder of Company B, who claims that Company B was discriminated against by Company A, with which Company B had a contractual relationship. Company B may not believe that it has been discriminated against, or even if it does, it may still wish to do business with Company A. For any number of valid reasons, Company B may conclude that its business interests will be best served by resolving any differences it may have had with Company A through nonjudicial means, or simply letting them pass and moving on.[3] In any event, the last thing Company B is likely to want in this situation is a lawsuit by its employees or shareholders

[3] Here, for example, according to the parties' briefs to the court of appeals, JWM settled its claims against Domino's before its employee and shareholder, McDonald, brought this suit in his own name. Plaintiff-Appellant's Opening Brief at 4; Defendants-Appellees' Answering Brief at 4.

claiming that Company A has discriminated against it. Company A may be far less likely to settle or continue doing business with Company B if it remains open to potential suits by employees, shareholders or others claiming to have been harmed by its alleged violation of Company B's rights. Thus, to allow such third-party suits would effectively take control of the right guaranteed to Company B by Section 1981—the right to make and enforce contracts—out of Company B's hands.

Second, as the Court went on to observe in *Singleton*, the "parties themselves usually will be the best proponents of their own rights." *Id.* at 114. Again, this is certainly true in Section 1981 actions. It is well-established that Section 1981 claims require proof of discriminatory intent. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982). A plaintiff generally must be prepared to prove that a defendant's proffered explanation for terminating a contract or rejecting a contract proposal is a pretext to cover racial bias. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[4] In the business context, this typically requires an understanding of business conditions, objectives and strategies better known to the contracting parties themselves than to any non-party.

"The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most

[4] The Court held that the scheme of proof for intentional discrimination claims under Title VII also applies to Section 1981 claims. *Patterson*, 491 U.S. at 186. Thus, once a plaintiff has established a *prima facie* case of discrimination and the defendant has proffered a legitimate, nondiscriminatory reason for its action, the plaintiff must prove by a preponderance of the evidence that the reasons articulated by the defendant were pretextual and that the defendant's real motives were discriminatory. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

effective advocates of those rights are before them." *Singleton*, 428 U.S. at 114. Company B, having participated directly in contractual dealings with Company A, generally will be in a better position than any non-party to those transactions to know the facts and circumstances surrounding any breakdown that may have occurred in the parties' relations. Company B also will be more likely than any outsider to have access to relevant documents and information. Thus, Company B likely will be a more effective advocate of its own rights under Section 1981 than any employee, shareholder, or other person who was not a party to the contractual dealings at issue.

Indeed, to allow plaintiffs to bring suits based on other parties' rights not only impairs the quality of advocacy in the courts, but also may directly harm the interests of the persons whose rights actually are at stake. For example, an inquiry into the reasons why Company B's contractual relations with Company A turned sour may require exploration of matters Company B would prefer for strategic or competitive reasons to keep confidential. Clearly, whether to launch a Section 1981 action that inevitably will lead to such an inquiry should be up to Company B alone, not to some third person pursuing his or her own agenda.

B. Prudent Concern for the Amount of Litigation in the Federal Courts Warrants Limiting Standing Under Section 1981 to Those Whose Own Rights Are at Stake

Finally, controlling the sheer quantity of litigation in the federal courts is a legitimate, prudential consideration for courts to take into account when deciding how far to extend the boundaries of standing under a statute such as Section 1981, which contains no "language suggesting that Congress meant to stretch standing to the limits of Article III." *Kyles*, 222 F.3d at 303. Viewed in that light, the potential implications of the Ninth Circuit's holding in this case are beyond breathtaking; they are truly appalling.

Indeed, even under the view of the majority of Circuits that Section 1981 standing is limited to the actual parties to a contractual relationship, the number of potential litigants is huge, given that every contract has at least two parties and every instance of discrimination in the "making, performance, modification, [or] termination" of a contract, or in the "enjoyment of all benefits, privileges, terms, and conditions" of a contractual relationship of any sort, constitutes an actionable event. 42 U.S.C. § 1981(b).

Under the Ninth Circuit's holding, however, each actionable event gives rise to a virtually infinite number of potential litigants. For under that holding, the potential litigants include anyone and everyone who can claim to have suffered some distinct injury because of an actionable event—*e.g.*, every employee who can claim to have lost wages because his employer lost a contract with another company; every shareholder who claims to have lost dividends or share value; every creditor who claims to have been prevented from collecting a debt; and everyone who claims to have suffered emotional distress due to a disruption in one company's contractual relations with another. The list could go on indefinitely.

There is simply no evidence that when Congress enacted Section 1981, it meant to open the federal courts to suits by persons whose only claim is that they have suffered as a result of a violation of some *other* person's right to make and enforce contracts. This Court should not open the doors now to such tangential claims, but should adopt the view of the majority of lower courts that the class of persons who can bring claims under Section 1981 is limited to those who actually seek to enter into or remain in the contractual relationships at issue.

CONCLUSION

For the reasons stated above, this Court should reverse the Ninth Circuit's decision in this case.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
ROBERT J. COSTAGLIOLA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

July 2005

ANN ELIZABETH REESMAN *
MCGUINESS NORRIS &
WILLIAMS LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

* Counsel of Record

No. 04-593

FILED
SEP 22 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL, INC., NAACP LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, AND LEGAL MOMENTUM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BARBARA R. ARNWINE
JOHN C. BRITTAIN
MICHAEL J. FOREMAN
SARAH C. CRAWFORD
TRICIA G. JEFFERSON
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
(202) 662-8351

THOMAS S. MARTIN
Counsel of Record
JONATHAN R. DEFOSSE
TIFFANY ALLISON GEORGE
SHANIEK MILLS MAYNARD
KEITH R. PALFIN
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 508-8000

(Additional Counsel Listed on Inside Cover)

September 22, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

ANTHONY ROBINSON
SARAH C. VON DER LIPPE
MINORITY BUSINESS
ENTERPRISE LEGAL
DEFENSE AND
EDUCATION FUND
1100 Mercantile Lane
Suite 115-A
Largo, MD 20774
(301) 583-4648

NATIONAL MINORITY
SUPPLIER DEVELOPMENT
COUNCIL, INC.,
1040 Avenue of the Americas,
Second Floor
New York, NY 10018
(212) 944-2430

JENNIFER K. BROWN
LEGAL MOMENTUM
395 Hudson Street
New York, New York 10014
(212) 413-7536

AIMEE J. BALDILLO
NATIONAL ASIAN PACIFIC
AMERICAN LEGAL
CONSORTIUM
1140 Connecticut Avenue,
NW
Suite 1200
Washington, DC 20036
(202) 296-2300

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
NORMAN J. CHACHKIN
ROBERT STROUP
MATTHEW B. COLANGELO
NAACP LEGAL DEFENSE
AND EDUCATION FUND
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 965-2200

Counsel for Amici Curiae

QUESTION PRESENTED

May the sole shareholder of a corporation who is the target of intentional racial discrimination in the performance and enforcement of a contract, and who suffers separate and distinct injury as a result thereof, maintain a cause of action for personal injuries under 42 U.S.C. § 1981?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE "BROAD AND SWEEPING NATURE" OF SECTION 1981 PROVIDES RELIEF FOR THE INJURIES INDIVIDUALS SUFFER AS A RESULT OF INTENTIONAL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS	6
A. The History of Section 1981 Demands a Broad Interpretation	7
B. Congress Reiterated Section 1981's Broad Reach in the 1991 Amendments	9
II. A NARROW READING OF SECTION 1981 CONTRADICTS ITS INTENDED PRACTICAL PURPOSE OF PROTECTING INDIVIDUALS AGAINST INTENTIONAL DISCRIMINATION	10
A. Where an Individual is the Target and Direct Victim of Discrimination in the Making and Enforcement of a Contract Executed by a Corporation He Owns, He is Entitled to Relief Under Section 1981	11

TABLE OF CONTENTS—Continued

Page

B. Limiting Relief to the Corporation's Injuries Ignores the Harm Caused to Individuals by Discrimination in the Enforcement of the Contract 14

C. Corporate Law Principles That Govern Remedies for Contractual Breach Should Not Be Imported into Civil Rights Law so as to Defeat the Broad Remedial Purposes for Which They Were Enacted 15

D. Creating Artificial Distinctions Between Victims of Discrimination Would Force Minority Business Owners to Choose Between Their Civil Rights and the Protection of the Corporate Form 17

III. ALLOWING THE DIRECT AND TARGETED VICTIMS OF DISCRIMINATION TO SUE WILL NOT LEAD TO A FLOOD OF LAWSUITS 21

A. The Ninth Circuit's Holding Requires a Separate and Distinct Injury 21

B. The Import of this Case is Limited to Plaintiffs Who are Direct Targets of Discrimination and Who Own and Operate Their Own Businesses 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES	Page
Adarand Constructors v. Slater, 228 F.3d 1147 (10th Cir. 2000)	18
Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970)	12
Barrows v. Jackson, 346 U.S. 249 (1953)	3
Bellows v. Amoco Oil Co., 118 F.3d 268 (5th Cir. 1997)	22
Bryant v. Aiken Reg'l Med. Ctrs., 333 F.3d 536 (4th Cir. 2003)	14
Builders Ass'n of Greater Chicago v. City of Chicago, 298 F. Supp. 2d 725 (N.D. Ill. 2003)	18
Burnett v. Grattan, 468 U.S. 42 (1984)	6
Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)	14
Chavis v. Clayton County School Dist., 300 F.3d 1288 (11th Cir. 2002)	8
Concrete Works of Colo. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003)	18, 20
Cunningham v. Kartridg Pak Co., 332 N.W.2d 881 (Iowa 1983)	22
Danco, Inc. v. Wal-Mart Stores, 178 F.3d 8 (1st Cir. 1999)	16
Edwards v. Walter Jones Const. Co., No. 98-4366, 2000 WL 302710 (6th Cir. Mar. 17, 2000)	22
Franchise Tax Bd. of California v. Alcan Aluminium Ltd., 493 U.S. 331 (1990)	22, 23
Gersman v. Group Health Assoc., 931 F.2d 1565 (D.C. Cir. 1991), *rev'd on other grounds*, 502 U.S. 1068 (1992)	13, 23
Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019 (9th Cir. 1983)	14, 21

TABLE OF AUTHORITIES—Continued

	Page
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	6, 12
Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc., 295 F.3d 1065 (10th Cir. 2002)	16
Hudson Valley Freedom Theater v. Heimbach, 671 F.2d 702 (2d Cir. 1982)	13
Johnson v. Railway Express Agency, 421 U.S. 454 (1975)	3
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)	7, 8
Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993)	4
McDonald v. Domino's Pizza, 107 Fed. Appx. 18 (9th Cir. 2004)	21
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)	6, 8
NAACP v. Alabama, 357 U.S. 449 (1957)	3
Northern Contracting v. Illinois, et al., No. 00-C-4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004)	18
O'Connor v. 11 W. 30th St. Restaurant Corp., Nos. 94 Civ. 2951, 93 Civ. 8895, 1995 WL 354904 (S.D.N.Y. Jun. 13, 1995)	24
Patterson v. McLean Credit Union, 491 U.S. 164 (1988)	3, 8, 9
Puryear v. County of Roanoke, 214 F.3d 514 (4th Cir. 2000)	9
R. G. Dun & Co. v. Shipp, 91 S.W.2d 330 (Tex. 1936)	22
Ritchie v. McMullen, 79 F. 522 (6th Cir. 1897)	22
Runyon v. McCrary, 427 U.S. 160 (1976)	6, 7, 8
Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987)	3

TABLE OF AUTHORITIES—Continued

	Page
Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990)	16
Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., et al., 345 F.3d 964 (8th Cir. 2003)	18
Smith v. Martin, 542 F.2d 688 (6th Cir. 1976)	23
Sullivan v. Little Hunting Park, 396 U.S. 229 (1969)	3, 8
Trainor v. Apollo Metal Specialities, 318 F.3d 976 (10th Cir. 2002)	9
Vierling v. Baxter, 141 A. 728 (Pa. 1928)	22
Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252 (1977)	13
Warth v. Seldin, 422 U.S. 490 (1975)	12
Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62 (2d Cir. 2000)	23
STATUTES AND LEGISLATIVE MATERIALS	
28 U.S.C. § 1658	6
42 U.S.C. § 1981	*passim*
H.R. Rep. No. 101-644 (Pt. I)	6, 9
H.R. Rep. No. 102-40 (Pt. I)	5, 6, 10, 14
MISCELLANEOUS	
1 Fletcher Cyclopedia Corporations § 2.10	19
Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148 (1992)	19
The Boston Consulting Group, *The New Agenda for Minority Business Development* (June 2005)	19, 20
U.S. Small Business Administration, Office of Advocacy, *Minorities in Business* (Nov. 2001)	20

INTEREST OF THE *AMICI CURIAE* [1]

The Lawyers' Committee for Civil Rights Under Law, the Minority Business Enterprise Legal Defense and Education Fund, the National Minority Supplier Development Council, Inc., the NAACP Legal Defense and Educational Fund, Inc., and the National Asian Pacific American Legal Consortium submit this brief as *amici curiae* with the consent of the parties, in support of Respondent's argument that an individual who is the actual target of a discriminatory actor's racially motivated breach of a contract can bring suit under 42 U.S.C. § 1981 for the damages he suffers even if he is not a formal party to the contract.

Amici are nonprofit organizations devoted to helping minorities and minority-owned businesses participate fully in the mainstream of American economic life. As courts and legislatures throughout the country have recognized, there is a long-standing pattern and practice of racial discrimination directed at minorities and minority business owners. The Court's decision will determine the extent to which § 1981 protects the individual rights of business owners to be free from intentional racial discrimination. *Amici* strongly believe, and the language and intent of § 1981 recognizes, that the protections of § 1981 are vital to addressing the distinct disadvantages that minority business owners face as a result of discrimination in the marketplace. Because this Court's decision will have a profound impact on the rights of minority business owners throughout the country, *amici* wish to present their views concerning the scope of § 1981's protections.

---

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation, to eradicate discrimination, is fully realized, and is concerned in this case with the ability of 42 U.S.C. § 1981 to protect business owners from unlawful racial discrimination.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote and protect programs and policies that provide opportunities for minority businesses to grow and thrive and to contribute to our communities and national economy. MBELDEF provides legal advocacy for minority businesses, over three quarters of which are single shareholder corporations or sole proprietorships according to Census Bureau surveys.

The National Minority Supplier Development Council, Inc. ("NMSDC") is a nonprofit corporation founded in 1979 that seeks to provide minority businesses access to purchasing opportunities in the public and private sectors. Currently, NMSDC has 39 regional offices and a national office that coordinate these efforts on a local and national level. Over 60% of NMSDC certified minority businesses are incorporated and 75% of the certified minority businesses specializ-

ing in construction are corporations. A large percentage of NMSDC certified incorporated businesses have fewer than 3 shareholders and many have only one.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York formed to redress injustice caused by racial discrimination and to assist African-Americans in securing their constitutional and statutory rights. For over six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts on matters of race discrimination in general, and employment discrimination in particular, including in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). LDF attorneys also litigated important cases regarding standing to assert civil rights claims, including *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *NAACP v. Alabama*, 357 U.S. 449 (1957); and *Barrows v. Jackson*, 346 U.S. 249 (1953).

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, NAPALC and its Affiliates, the Asian American Institute, Asian Law Caucus and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in racial discrimination issues that have an impact on the Asian American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls

by using the power of the law and creating innovative public policy. Legal Momentum is committed to vigorous enforcement of the civil rights laws to eradicate all forms of discrimination, including race discrimination. It is particularly interested in this case because § 1981 provides a crucial guarantee of nondiscrimination to the hundreds of thousands of women of color who own small businesses.

The resolution of this case will have a significant effect on the extent to which the *amici* can protect the rights of their clients.

SUMMARY OF ARGUMENT

In the present case, the Court is called on to determine the proper scope of one of the nation's oldest and most important civil rights laws, 42 U.S.C. § 1981, which bars all intentional racial discrimination in the making, performance, and enforcement of contracts. Respondent John McDonald ("McDonald"), an African-American and the sole shareholder and operator of JWM Investments, Inc. ("JWM"), filed suit under § 1981 when Petitioners, Domino's Pizza, LLC, Domino's Pizza, Inc. and Debbie Pear, terminated a construction contract with JWM because McDonald is black.[2] As a direct result of Petitioners' intentional discrimination, McDonald—the target of that discrimination—suffered severe physical, emotional and financial injuries distinct from the injuries suffered by JWM. The Ninth Circuit held that McDonald had stated a valid cause of action under § 1981 for his personal injuries.

The Ninth Circuit's decision fits squarely within the parameters of the language of § 1981, comports with decades of case law interpreting that statute, and furthers Congress'

---

[2] These facts must be taken as true, because this case comes before the Court on a motion to dismiss. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

clearly expressed purpose in enacting the law and amending it in 1991. By its terms, § 1981 prohibits, without exception, *all* discrimination in the making, performance and enforcement of contracts. The courts applying this prohibition have consistently interpreted § 1981 to provide remedies for every class and category of personal, as well as corporate, injury flowing from intentional racial discrimination. This expansive approach to the application of § 1981 is grounded in the unambiguous intention of Congress to provide full relief to those who are the targets of discriminatory actions in the area of commercial contracts. Indeed, § 1981 reflects the unambiguous determination of Congress to foster the participation of newly freed slaves in the marketplace by protecting them from discrimination and harassment in contracting. It was passed as a response to widespread acts of violence and intimidation aimed at creating an economic environment that was hostile to black participation. It was designed from its inception to broadly protect the economic interests of minority individuals and to enable them to enter and enforce contracts in a society free from discrimination.

The core historical purpose of § 1981 was to offer *full* protection to *individuals*, like John McDonald, from the "terrible humiliation, pain and suffering" of intentional racial discrimination in contracting. H.R. Rep. No. 102-40 (Pt. I), at 14-15 (1991). The decision below adheres to this core principle by permitting individuals who are the target of discrimination in contracting to seek redress for the personal injuries they suffer, regardless of whether the subject contract was signed by the individual in his personal capacity or as the sole shareholder and only employee of a corporation.

Recognizing that victims of intentional racial discrimination have a cause of action for their personal injuries under the circumstances presented in this case is consistent with Congress' intention that § 1981 foster minority participation in the marketplace. It would be more than unfortunate if millions of minority business owners like McDonald were

forced to choose between the advantages of the corporate form and the availability of remedies for personal injuries resulting from violations of their civil rights. Minority business owners should not be forced to check their race at the door. The Court should thus affirm the decision below.

ARGUMENT

I. THE "BROAD AND SWEEPING NATURE" OF SECTION 1981 PROVIDES RELIEF FOR THE INJURIES INDIVIDUALS SUFFER AS A RESULT OF INTENTIONAL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS

Section 1981 "was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts." *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 295 (1976). The protections and remedies provided by § 1981 have become an "important part of the fabric of our law." *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring). Although these protections concern the right to contract, § 1981 does not and was never intended to merely replicate the remedies that commercial law provides for breaches of contract. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (noting "Section 1981 has a much broader focus than contractual rights"), *superceded by statute on other grounds*, 28 U.S.C. § 1658. Rather, § 1981 serves the constitutional imperative of eradicating the badges of slavery and compensating victims of intentional discrimination, like McDonald, for the severe physical, emotional and financial injuries that they suffer. H.R. Rep. No. 101-644 (Pt. I), at 8 (1990); H.R. Rep. No. 102-40 (Pt. I), at 14-15; *Burnett v. Grattan*, 468 U.S. 42, 53 (1984) (noting "[t]he goals of the federal [civil rights] statutes are compensation of persons whose civil rights have been violated"). Without question, the primary goal of § 1981 is to protect human beings from discrimination.

A. The History of Section 1981 Demands a Broad Interpretation

Section 1981 was derived from § 1 of the Civil Rights Act of 1866 (14 Stat. 27). *Runyon*, 427 U.S. at 168-69; H.R. Rep. No. 101-644 (1990). As this Court has noted, that Act was "cast in sweeping terms." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968). From the beginning, the protections of § 1981 were focused on securing fundamental civil rights for individuals subject to discrimination. Indeed, the most immediate goal of the Act was to remedy discrimination that freed slaves faced in the wake of Reconstruction and the Thirteenth Amendment. *Id.* at 432. The Act was created against a landscape of intense persecution, intimidation, and harassment aimed at preventing African-Americans from enjoying the full benefits of the American economy. As Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, said in 1866:

> [the Thirteenth Amendment] declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

See id. at 431-32 (quoting Cong. Globe, 39th Cong., 1st Sess., 43).

Although the immediate goal of the Civil Rights Act of 1866 was to secure equal rights for freed slaves, this Court has held that the overall purposes of the statute were much broader. "[T]he statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and

immediate plight of the newly freed Negro slaves." *McDonald*, 427 U.S. at 296. Rather, "the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Id.* at 295.

The Court has previously rejected attempts to narrowly interpret the "great fundamental rights" secured by the Civil Rights Act of 1866:[3]

> A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 [and § 1981] was derived.[4]

Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) (allowing a white property owner to bring suit based on the exclusion of his African-American tenant from a community recreation center because "the white owner is at times the only effective adversary of the unlawful restrictive covenant"); *see also Alfred H. Mayer*, 392 U.S. at 431 (noting that the legislative history describing the objectives and terms of the Civil Rights Act of 1866 "belie[s] any attempt to read it narrowly"). Several Circuit Courts of Appeals have noted that civil rights laws such as § 1981 cannot be mechanically applied, but rather must be liberally construed to achieve Congress' broad remedial purposes. *See, e.g., Chavis v. Clayton County School Dist.*, 300 F.3d 1288, 1292 (11th Cir. 2002) ("[T]he Reconstruction civil rights acts . . . are to be 'accord(ed) [] a sweep as broad as (their) language.'")

---

[3] The one exception was *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988), to which Congress immediately responded by amending § 1981 to make clear its broad reach. *See infra* Section I.B.

[4] This Court has noted that §§ 1981 and 1982 are both derived from the Civil Rights Act of 1866 and there is "no reason to construe these sections differently." *Runyon*, 427 U.S. at 171 (citing *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973)).

(quoting *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971)); *Trainor v. Apollo Metal Specialities*, 318 F.3d 976, 983 (10th Cir. 2002) ("In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end."); *Puryear v. County of Roanoke*, 214 F.3d 514, 522 (4th Cir. 2000) (stating that when applying a remedial statute, "courts must construe the legislation broadly to effect its purposes").

B. Congress Reiterated Section 1981's Broad Reach in the 1991 Amendments

Congress also has left no misimpression about the broad and enduring remedial purposes of § 1981. In 1991, Congress amended the statute in response to the Court's holding in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court narrowly applied the terms of § 1981 to hold that the prohibition on discrimination in the "making" of a contract did not extend to discrimination in the performance of a contract. *Id.* at 176-77. In the 1991 amendments, Congress disagreed with this mechanical application of § 1981's terms. Congress was particularly concerned that a gap not be created in the broad protections and remedies provided to the individuals harmed by intentional racial discrimination. The amendments' legislative history indicated that *Patterson* prevented "victims of intentional discrimination [from being made] whole for physical and emotional injury resulting therefrom." H.R. Rep. No. 101-644 (Pt. I), at 18 (1990) (noting also that *Patterson* gave employers "free rein to discriminate against their employees once they are hired"). Foreshadowing the claims in this case, Congress noted that "[v]ictims of intentional discrimination often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other eco-

nomic losses as a result of the discrimination." H.R. Rep. No. 102-40, at 14-15 (1991). Accordingly, the 1991 amendments defined § 1981's use of the phrase "make and enforce contracts" to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Thus, the 1991 amendments were intended to ensure that § 1981 provided full remedies for the injuries suffered by victims of intentional discrimination in any aspect of the contractual relationship. Congress made clear that it intended to "strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination." *Id.* at 18. Congress noted that it intended § 1981 to "bar *all* race discrimination in contractual relations." *Id.* at 92 (emphasis added).

II. A NARROW READING OF SECTION 1981 CONTRADICTS ITS INTENDED PRACTICAL PURPOSE OF PROTECTING INDIVIDUALS AGAINST INTENTIONAL DISCRIMINATION

Petitioners claim that McDonald is not entitled to be made whole for injuries squarely within the ambit of § 1981 protection because he opted to make and enforce the contracts at issue using the corporate form for his business. Under Petitioners' proposed limitation of § 1981, McDonald has injury but no standing, while his corporation has standing but only limited injuries. This limitation holds great advantages for parties engaged in intentional discrimination because the corporation is unable to recover for the severe physical, emotional and financial injuries often suffered by those personally harmed as a direct result of discrimination. This crabbed analysis creates a broad gap in the protections of § 1981, denying individual remedies to

victims of intentional discrimination who operate their businesses in the corporate form.

The constriction of § 1981 claims advocated by Petitioners is inconsistent with the broad remedial purpose of the statute because it would: (a) deny relief to individuals who were the actual targets of intentional discriminatory contract enforcement; (b) ignore the separate and distinct injuries that individuals suffer from discrimination in the enforcement of contracts; (c) compromise the remedial goals of the statute by importing elements of contract law inimical to the statute's expansive goals; and (d) force minority victims of discrimination to forfeit remedies for actual injury in order to obtain the advantages of the corporate form.

A. Where an Individual is the Target and Direct Victim of Discrimination in the Making and Enforcement of a Contract Executed by a Corporation He Owns, He is Entitled to Relief Under Section 1981

McDonald is a direct victim of discrimination. Petitioners intentionally discriminated *against McDonald* on the basis of *his* race. Petitioners terminated their contracts with McDonald's corporation because *McDonald* is African-American. McDonald is the sole shareholder, director, and officer of JWM and the only person who interacted with Petitioners in making and attempting to enforce the contracts. Because Petitioners did not want to do business with McDonald on the basis of his race, they terminated their contracts with the company that he owns and operates. *McDonald* suffered severe physical, emotional and financial injuries *as a direct result of Petitioners' discrimination.*

McDonald is asserting his individual right to be free from racial discrimination and is seeking redress for the personal harms that he suffered as a result of the intentional discrimination Petitioners targeted at him. McDonald is *not*

asserting the legal rights of a third party, *i.e.*, JWM, nor is he seeking to benefit as a third party beneficiary from the contract between JWM and Petitioners. The harms that McDonald suffered were not suffered by JWM. No one is in a better position than McDonald himself to seek redress for the personal indignities and harms that he suffered as a result of Petitioners' discriminatory conduct towards him.

This Court has found standing where there is injury-in-fact and "the interest sought to be protected by the complainant is arguably within the zone of interests sought to be protected or regulated by the statute." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970) (finding standing because plaintiffs' interests were within the zone protected under the Bank Service Corporation Act). Here, McDonald is clearly within the zone of interests protected by § 1981.[5] He is an African-American who was subjected to discrimination during the performance and enforcement of four contracts with Petitioners, and thus is *exactly* the type of person that Congress intended to protect under § 1981. The statute was enacted to protect the individual right to be free from discrimination. *See supra* Section I. As this Court has explained, § 1981's command that "competence and capacity to contract shall not depend on race" is "part of a federal law barring racial discrimination, which . . . is a fundamental injury to the *individual* rights of a *person*." *Goodman*, 482 U.S. at 661 (emphasis added).

For minority-owned single shareholder corporations like McDonald's, while the corporation can suffer certain economic effects from discrimination, the target of the discrimination is the individual who interacts with the dis-

---

[5] The analysis would not differ under the alternative standard of whether the "statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

criminatory actor. This Court's jurisprudence, as well as common sense, dictates that "a corporation . . . has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). A corporation is entitled to sue under § 1981, however, when it is harmed because of its relationship with a member of a protected class. *See, e.g., Gersman v. Group Health Assoc.*, 931 F.2d 1565, 1568 (D.C. Cir. 1991) (holding that a corporation has standing to litigate because it can suffer harm from discrimination), *rev'd on other grounds*, 502 U.S. 1068 (1992); *Hudson Valley Freedom Theater v. Heimbach*, 671 F.2d 702, 708 (2d Cir. 1982) (holding that a corporation that is harmed by discriminatory action has standing to litigate that harm).

While allowing a raceless entity such as a corporation to sue is appropriate given the broad purposes for which Congress enacted § 1981, restricting § 1981 so that ONLY the corporation can sue would eviscerate the law's core purpose of protecting the *individual's* right to be free from discrimination in the making and enforcement of contracts. McDonald *is* a member of the protected class under § 1981 and was the direct target of Petitioners' racial discrimination, regardless of whether he was acting in his individual capacity or as an agent for his corporation. In the case of a corporation with a single shareholder and operator, it is only that individual's racial identity that is at issue. If the discriminatory actor does not like the shareholder's race and does not want to do business with that individual, the decision not to enter into or honor contracts with the corporation is based on prejudice towards the individual.

In the present case, Petitioners discriminated against McDonald as an individual and he is entitled to redress for personal injuries that fall clearly within the zone of interests that § 1981 protects.

B. Limiting Relief to the Corporation's Injuries Ignores the Harm Caused to Individuals by Discrimination in the Enforcement of the Contract

When intentional discrimination in contracting is targeted at and causes injuries to the sole shareholder and operator of a corporation, the human victim of the discrimination would not be recognized or made whole if only the corporation could bring a lawsuit under § 1981. In enacting § 1981, Congress recognized that civil rights laws must address the injuries that individual victims of intentional discrimination often suffer, including humiliation, pain, suffering, emotional disorders, medical problems, and accompanying medical expenses and other economic harm. *See* H.R. Rep. No. 102-40, at 14-15 (1991). These injuries are separate and distinct from any injuries that a corporation might suffer as a result of discrimination.

In keeping with the fundamental purpose of the statute and the undeniable realities of the potential harms of discrimination, courts have allowed individuals to recover for the emotional and mental harms they suffered as a result of intentional discrimination. *See, e.g., Bryant v. Aiken Reg'l Med. Ctrs.*, 333 F.3d 536, 546-47 (4th Cir. 2003) (affirming lower court award of damages to victim of intentional discrimination for injuries including "emotional distress"); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (affirming lower court award of damages to victim of intentional discrimination for injuries including "humiliation and other emotional harm"); *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983) (affirming lower court award of damages to victim of intentional discrimination for injuries including "humiliation and embarrassment"). These are precisely the types of injuries that McDonald has alleged that he, not JWM, suffered due to Petitioners' discriminatory actions. As a

direct result of Petitioners' discrimination, McDonald suffered the loss of his reputation, his business, his credit rating, and his health. Contract recovery for JWM would not even begin to compensate McDonald for his injuries.

Petitioners' interpretation of § 1981 would deny the individuals who are the targets of discrimination redress for harms that they uniquely suffer. This interpretation would vitiate the remedy for harm inflicted upon the human target of discrimination, simply by virtue of the fact that the victim utilized the corporate form in executing his contract. Such an interpretation would turn a blind eye to egregious racial harassment of the sole shareholder of a corporation so long as such harassment did not result in an injury to the corporation.

C. Corporate Law Principles That Govern Remedies for Contractual Breach Should Not Be Imported into Civil Rights Law so as to Defeat the Broad Remedial Purposes for Which They Were Enacted

This Court should not interpret unrelated principles of corporate and contract law to defeat the broad remedial purposes of the civil rights laws. As noted above, in passing and amending § 1981, Congress intended to prohibit *all* intentional discrimination in contractual relationships. *See supra* Section I. This remedial goal is not qualified. Nothing in the language or history of § 1981 suggests that its application should vary based on whether, as a matter of corporate law, a person operates as a sole proprietorship, a corporation, a limited liability company, a partnership, a limited liability partnership, or any number of other business entities.

Minority individuals must be allowed remedies for intentional racial discrimination in the enforcement of contracts, irrespective of their decision to contract as a corporate entity. Three circuits below reached the opposite conclusion

relying upon a purely mechanical application of concepts drawn from the body of law governing traditional remedies for breach of contract.[6] Although § 1981 concerns the making and enforcement of contracts, it is neither part of the commercial code nor an articulation of contract law remedies. Rather, § 1981 is a broad and prophylactic effort to advance constitutional guarantees through remedial legislation whose sole purpose was to free individuals from the burdens of discriminatory action. These protections should not be subject to caveat or qualification based on corporate or contract law principles engrafted on legislation designed to serve entirely different goals. Congress did not intend to draw artificial distinctions between essentially identical victims of discrimination based solely on whether they sign contracts as a corporation or a sole proprietorship.

---

[6] The First, Fifth and Tenth Circuits have engaged in such analysis. *See Danco, Inc. v. Wal-Mart Stores*, 178 F.3d 8, 14 (1st Cir. 1999) (refusing an individual cause of action because the "suffering [to the individual], however real, is not automatically damage to [the corporation]"); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 565 (5th Cir. 1990) (refusing an individual cause of action because shareholders do not have rights to raise claims in place of a corporation); *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (refusing an individual cause of action because "a stockholder cannot maintain a personal action against a third party for harm caused to the corporation"). With only minimal explanation, these courts elevate corporate form over civil rights law by resolving the debate based on whether the § 1981 plaintiff is a formal signatory to the contract. *E.g., Danco*, 178 F.3d at 14 (explaining, "not surprisingly, that the contract in question was between [defendant] and [the corporation]," not the sole shareholder). Their holdings are problematic for two reasons. First, requiring that § 1981 plaintiffs are formal signatories goes well beyond any of the "make and enforce" language in the statute. Second, and perhaps more disturbing, these courts have essentially abdicated their duty to conduct a thorough examination of the issues and have failed even to *offer* a plausible rationale for allowing a legal fiction—the corporate form—to trump important federal rights.

Section 1981's human focus is at odds with any attempt to subject it to a mechanical application of corporate or contract law principles that are foreign to the origin and purpose of this civil rights law.[7] To engraft the remedial limitations of corporate or contract law on a federal civil rights statute so as to limit recovery for intentional discrimination defeats the Congressional intent. There is simply no principled support for the proposition that corporate form was ever intended to be the determinative factor in the availability of § 1981 relief for injury stemming from racial discrimination or a basis to subordinate the intentionally broad purpose of civil rights laws to the mechanical application of state corporation laws.

D. Creating Artificial Distinctions Between Victims of Discrimination Would Force Minority Business Owners to Choose Between Their Civil Rights and the Protection of the Corporate Form

Limiting standing under § 1981 to the corporate entity, in situations where a minority business owner has chosen to incorporate and then suffered intentional racial discrimination in the performance of a contract, would result in unequal

---

[7] Even if it were appropriate to do so, however, a strict application of corporate law principles to § 1981 would not limit standing to corporate entities when intentional discrimination was targeted at the owner of that entity. McDonald has suffered a separate and distinct injury from that suffered by the corporate entity. *See infra* Section III.A (discussing "separate and distinct" injury doctrine). When a shareholder suffers such an injury, even if the corporate entity is harmed by the same act, corporate law allows the shareholder to bring a direct tort or other action against the third party that caused the harm. *See id.* Section 1981 is backed by a constitutional imperative to protect human dignity and promote economic advancement. It cannot be the case that a racial minority has less of a right to bring an action under § 1981 than he does to bring common law or state statutory claims as to which Congress has no interest and the constitution generates no imperative.

application of the civil rights laws to virtually identical victims of discrimination. Those who enter "personal contractual relationship[s]," Petitioners' Brief ("Pet. Br.") at 39, would be entitled to remedies for their injuries. By contrast, a person who enters the same contract, endures the same discrimination, and suffers the same injuries would have no remedies under § 1981 if he or she operates the business as a corporation. Sole shareholders should not be required to check their race at the door in order to obtain the protections of the corporate form. The civil rights laws, designed to protect individual dignity and deter harmful discrimination, do not turn on such technical distinctions of corporate law.

If the Court were to narrow the application of § 1981 based on such artificial distinctions, members of protected classes would be presented with a Hobson's choice between relinquishing their civil rights and operating their businesses subject to unlimited personal liability. Such a narrowing of the application of § 1981 would add one additional barrier to the growth and expansion of minority businesses, a class of businesses that already faces widespread discrimination in today's marketplace.[8] Section 1981, which was specifically designed to remedy discrimination in the economic world, should not be interpreted to require racial minorities to abandon their civil rights if they seek to advance their economic interests via incorporation.

The ability to incorporate is vital for minority-owned small businesses. Incorporation "facilitate[s] legitimate business transactions, eliminate[s] unreasonable liabilities and at the

---

[8] *See, e.g., Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., et al.*, 345 F.3d 964, 969-71 (8th Cir. 2003); *Concrete Works of Colo. v. City and County of Denver*, 321 F.3d 950, 960-70 (10th Cir. 2003); *Adarand Constructors v. Slater*, 228 F. 3d 1147, 1167-74 (10th Cir. 2000); *Northern Contracting v. Illinois, et al.*, No. 00-C-4515, 2004 WL 422704, at *13-17 (N.D. Ill. Mar. 3, 2004); *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725, 742 (N.D. Ill. 2003).

same time safeguard[s] the investor, the creditor and those dealing with the corporation." 1 Fletcher Cyclopedia Corporations § 2.10, pps. 10-11. The limited liability aspect of the corporate form was designed to facilitate the economic advancement of society. Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148, 163 (1992) ("[L]imited liability came about because of a wish to further economic progress and to maximize state wealth through encouraging investment."). Limited liability is particularly important for small businesses, which represent the vast majority of businesses owned by racial minorities. Indeed, it has been noted that:

> [A]n . . . important factor contributing to limited liability's present stronghold in American corporate law was a desire to encourage individual investment in smaller firms. It is of a piece with other nineteenth-century manifestations of rugged individualism, and reflects a traditional American policy to favor the small-scale entrepreneur. Limited liability, insofar as it reflects a venerable desire to help out smaller investors, those more typical of the people, thus reflects democracy as much as economics. Perhaps, then, limited liability ought to be most sacred for smaller firms, and not those possessing great economic wealth.

Id.

A recent study by the Ewing Marion Kauffman Foundation (the "Kauffman Study") concluded that minority businesses are not maintaining pace with the larger U.S. business community.[8] It is no secret that minority businesses in the U.S. have historically experienced severe impediments to business formation and growth—they are generally smaller

---

[8] The Boston Consulting Group, *The New Agenda for Minority Business Development*, at 1-3 (June 2005).

in size[9] and disproportionately fewer in number than their white counterparts.[10] In order to succeed, existing minority businesses must be prepared to form strategic alliances, participate in mergers and acquisitions, and access the capital markets. In reality, however, most minority businesses today disproportionately operate as sole proprietorships: 82% of minority businesses are sole proprietorships versus 71% of non-minority firms.[11] The Kauffman Study makes clear that in order to compete in today's global economy, these sole proprietorships must increasingly take advantage of the protections afforded by doing business in the corporate form.

Denying standing under § 1981 to victims of intentional discrimination who opt to make, perform and enforce contracts through a corporation would force minority business owners to choose between their civil rights and the benefits of the corporate form. Such a result would be inconsistent with the goals of § 1981. *See supra* Section I.

---

[9] Seventy-nine percent of minority businesses do not have paid employees and, of those that have paid employees, 69% have fewer than nine. U.S. Small Business Administration, Office of Advocacy, *Minorities in Business*, at 15 (Nov. 2001).

[10] This is not to say that minority businesses and small businesses alike do not have the capacity to complete large construction contracts. To the contrary, the Court of Appeals in *Concrete Works of Colo. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), found that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of minority- and women-owned businesses are, themselves, the result of industry discrimination. *Id.* at 981, 990-92. In fact, the trial court there found that most firms have few full-time permanent employees and must grow or shrink their performance capacity according to the volume of business they are doing. *Id.* at 981 (upholding the constitutionality of Denver's minority and women business enterprise program).

[11] *See* Kauffman Study at 31.

III. ALLOWING THE DIRECT AND TARGETED VICTIMS OF DISCRIMINATION TO SUE WILL NOT LEAD TO A FLOOD OF LAWSUITS

Petitioners and their *amici* wrongly suggest that affirming the Ninth Circuit's decision will result in a deluge of civil rights lawsuits by virtually any person, no matter how tenuous their relationship to the alleged discrimination. According to Petitioners, the Ninth Circuit's holding allows anyone tangentially related to the contract to sue under § 1981 and radically expands the class of potential plaintiffs to an "essentially limitless" number. Pet. Br. at 37. The Court must not fall prey to such scare tactics. In reality, the Ninth Circuit's holding is limited in two important respects. First, the ruling expressly restricts § 1981 standing to persons who have suffered a *separate and distinct* injury from that of the corporation. Second, the facts of the case limit its import to plaintiffs who are the direct targets of discrimination (not mere bystanders) and who own and operate their own businesses.

A. The Ninth Circuit's Holding Requires a Separate and Distinct Injury

The Ninth Circuit's ruling requires every individual plaintiff bringing a claim under § 1981 to show injuries that are distinct from that of the corporation. *See McDonald v. Domino's Pizza*, 107 Fed. Appx. 18, 19 (9th Cir. 2004). In doing so, the court relied on *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983). In *Gomez*, plaintiff and his corporation were denied a contract to provide hospital services because he and his employees were Hispanic and the hospital was wary of "too many brown faces." *Id.* at 1020. The plaintiff sued under § 1981 for personal injuries that were distinct from the corporation's injuries, including loss of employment as director of the defendant's emergency room, humiliation and embarrassment. *Id.* at 1021. The court allowed the plaintiff to bring his

claim because he suffered a distinct and palpable injury and his interests were within the zone of interests to be protected by § 1981. *Id.* This comports with a long line of cases allowing shareholders to sue for injuries that are unique to them. *E.g.*, *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (recognizing that an exception to the "longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation" allows "a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated"); *see also Ritchie v. McMullen*, 79 F. 522, 524 (6th Cir. 1897); *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 883 (Iowa 1983); *R. G. Dun & Co. v. Shipp*, 91 S.W.2d 330, 331 (Tex. 1936); *Vierling v. Baxter*, 141 A. 728, 729 (Pa. 1928).

Like *Gomez*, there is no dispute that McDonald has alleged injuries that are personal to him and distinct from any injuries suffered by JWM. He is not seeking to step into the corporation's shoes—rather, he is seeking redress for his own damages, which include the loss of bank financing, injury to his personal credit, injury to his ability to acquire homeowners' insurance, emotional distress, and personal medical problems.

Thus, the Ninth Circuit's decision provides no support for plaintiffs who bring individual § 1981 claims alongside corporations in federal courts without alleging a separate and distinct injury. For example, although the plaintiff in *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 277 (5th Cir. 1997), brought suit in an individual capacity, he did not allege personal injuries but sought rather to recover only the economic losses suffered by his corporation. Similarly, in *Edwards*, *Gersman*, and *Smith*, the plaintiffs failed to allege personal injuries resulting from discrimination that were distinct from the corporation's injury. *See Edwards v. Walter Jones Const. Co.*, No. 98-4366, 2000 WL 302710, at *1 (6th

Cir. Mar. 17, 2000); *Gersman v. Group Health Assoc.*, 931 F.2d 1565, 1569 (D.C. Cir. 1991), *rev'd on other grounds*, 502 U.S. 1068 (1992); *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976). It is well settled that a shareholder cannot maintain a personal action for harm caused to his corporation. *E.g., Alcan Aluminium*, 493 U.S. at 336. Because Petitioners' cast of hypothetical and remotely related plaintiffs would not be able to show a separate and distinct harm from the corporation, they would not be enabled by the Ninth Circuit's decision.

B. The Import of this Case is Limited to Plaintiffs Who are Direct Targets of Discrimination and Who Own and Operate Their Own Businesses

McDonald was not "tangentially related," "incidental," or "merely an affiliate" of JWM as Petitioners and its *amici* insist—indeed, for all practical purposes, McDonald *was* JWM. JWM was a close corporation, wholly owned by McDonald and operated by him as owner. McDonald is the person who negotiated, created, and performed the contracts. He was solely responsible for ensuring that JWM's contractual obligations were met and the required work was done. In fact, all of Petitioners' interactions regarding the contracts were solely with McDonald. It was McDonald who rejected modification of the contracts and McDonald who adamantly fought against Petitioners' termination of the contracts. To deal with JWM was, practically speaking, to deal with McDonald.

The argument that McDonald, having availed himself of the corporate form, gives up all rights to sue for distinct injuries under § 1981 is specious. There are numerous instances in which the law disregards the corporate form in cases of wrong-doing by shareholders—especially in cases where the corporation has only one or a few shareholders who are directly implicated in the discrimination or who act as an alter ego for the corporation. *See, e.g. Whidbee v. Garzarelli*

Food Specialties, Inc., 223 F.3d 62, 74-75 (2d Cir. 2000); *O'Connor v. 11 W. 30th St. Restaurant Corp.*, Nos. 94 Civ. 2951, 93 Civ. 8895, 1995 WL 354904, at *4 (S.D.N.Y. Jun. 13, 1995). Likewise, sole corporate shareholders like McDonald must be allowed to invoke the protection of § 1981 when they are themselves the victim of discrimination prohibited by § 1981. It would be odd indeed if the law were construed so that McDonald, as the owner of a corporation, were to be subject to suit under § 1981—and simultaneously left without any remedy at all when he himself is the victim of race discrimination.

Accordingly, the Ninth's Circuit's ruling has a narrow and compelling application where the plaintiff: (1) was the direct target of the discrimination; (2) suffered separate and distinct harm; and (3) owned and operated his business in such a way that to deal with the corporation was essentially to deal with him. As a result, Petitioners' dire predictions about the impact of this case have no basis. There is simply no support in the Ninth Circuit's decision for the claim that "every employee of a large corporation would have standing to bring a lawsuit alleging that his or her employer lost a big contract for racially discriminatory reasons." *See* Pet. Br. at 38. Petitioners and their *amici* are wrong to assert that the decision below opens the federal courts to suits by people whose only claim is that they have suffered because of a violation of some *other* person's right. *See* EEAC Br. at 15. That is not the case at all. Rather, what the Ninth Circuit has done is to ensure that remedies remain available for actual injuries to the human victims of racial discrimination in the making and enforcement of contracts as Congress intended in enacting § 1981.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

BARBARA R. ARNWINE
JOHN C. BRITTAIN
MICHAEL J. FOREMAN
SARAH C. CRAWFORD
TRICIA G. JEFFERSON
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W.,
Suite 400
Washington, D.C. 20005
(202) 662-8351

ANTHONY ROBINSON
SARAH C. VON DER LIPPE
MINORITY BUSINESS
ENTERPRISE LEGAL DEFENSE
AND
EDUCATION FUND
1100 Mercantile Lane
Suite 115-A
Largo, MD 20774
(301) 583-4648

NATIONAL MINORITY
SUPPLIER DEVELOPMENT
COUNCIL, INC.,
1040 Avenue of the Americas,
Second Floor
New York, NY 10018
(212) 944-2430

JENNIFER K. BROWN
LEGAL MOMENTUM
395 Hudson Street
New York, New York 10014
(212) 413-7536

THOMAS S. MARTIN
Counsel of Record
JONATHAN R. DEFOSSE
TIFFANY ALLISON GEORGE
SHANIEK MILLS MAYNARD
KEITH R. PALFIN
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 508-8000

AIMEE J. BALDILLO
NATIONAL ASIAN PACIFIC
AMERICAN LEGAL
CONSORTIUM
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036
(202) 296-2300

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
NORMAN J. CHACHKIN
ROBERT STROUP
MATTHEW B. COLANGELO
NAACP LEGAL DEFENSE
AND EDUCATION FUND
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 965-2200

Counsel for Amici Curiae

September 22, 2005

No. 04-593

IN THE

Supreme Court of the United States

DOMINO'S PIZZA, INC., *et al.*,

Petitioners,

v.

JOHN McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NEW YORK, ILLINOIS, IOWA, MASSACHUSETTS, MONTANA, VERMONT, WISCONSIN, AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CAITLIN J. HALLIGAN*
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

SHAIFALI PURI
BENJAMIN N. GUTMAN
Assistant Solicitors General

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Amici Curiae

(Additional Attorneys List on Inside Cover)

196876

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3000

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Second Floor
Des Moines, IA 50319
(515) 281-5673

THOMAS F. REILLY
Attorney General
of Massachusetts
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3173

PEGGY A. LAUTENSCHLAGER
Attorney General of Wisconsin
17 West Main Street
PO Box 7857
Madison, WI 53702-7857
(608) 266-1220

KERRY E. DRUE
Acting Attorney General of
the Territory of the Virgin Islands
34-38 Kronprindsens Gade
GERS Complex, 2nd Floor
St. Thomas,
U.S. Virgin Islands 00802
(340) 774-5666

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* STATES ... 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

POINT I

SECTION 1981'S PROTECTION AGAINST RACIALLY DISCRIMINATORY INTERFERENCE WITH ECONOMIC ACTIVITY ENCOMPASSES THIRD-PARTY INTERFERENCE CLAIMS 4

A. The Text and History of Section 1981 Confirm That It Protects the Right to Enjoy Contractual Relationships with Third Parties Free from Racially Motivated Interference. 6

B. That Section 1981 Is a "Tort-Like" Cause of Action Confirms That It Encompasses Interference With a Plaintiff's Contract with a Third Party. 10

C. Sole Shareholders Should Not Be Precluded from Bringing a Claim Under Section 1981. 15

Contents

Page

POINT II

THE NINTH CIRCUIT'S DECISION DOES NOT EXPAND THE STATES' LIABILITY FOR INTENTIONAL DISCRIMINATION 18

CONCLUSION 23

TABLE OF CITED AUTHORITIES

CASES *Page*

Artis v. Francis Howell N. Band Booster Association,
161 F.3d 1178 (8th Cir. 1998) 22

Bains LLC v. Arco Products Co.,
405 F.3d 764 (9th Cir. 2005) 17, 18

Butts v. County of Volusia,
222 F.3d 891 (11th Cir. 2000) 21

Cedric Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001) 16

Chapman v. Houston Welfare Rights Organization,
441 U.S. 600 (1979) 19

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 23

Daniels v. Pipefitters' Association Local Union No. 597,
945 F.2d 906 (7th Cir. 1991) 13-14

Dennis v. County of Fairfax,
55 F.3d 151 (4th Cir. 1995) 21

Edelman v. Jordan,
415 U.S. 651 (1974) 22

Cited Authorities

Page

Ex parte Young,
209 U.S. 123 (1908) 22

Federation of African American Contractors v. City of Oakland,
96 F.3d 1204 (9th Cir. 1996) 21-22

General Building Contractors Association v. Pennsylvania,
458 U.S. 375 (1982) 1, 20

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) .....*passim*

Guides, Ltd. v. Yarmouth Group Property Management, Inc.,
295 F.3d 1065 (10th Cir. 2002) 18

Haddle v. Garrison,
525 U.S. 121 (1998) 14, 15, 17

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 22

Imagineering, Inc. v. Kiewit Pacific Co.,
976 F.2d 1303 (9th Cir. 1992) 13

Jett v. Dallas Independent School District,
491 U.S. 701 (1989) 21, 22

Cited Authorities

Page

Johnson v. Railway Express Agency,
421 U.S. 454 (1975) 8

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 8

Lauture v. IBM Corp.,
216 F.3d 258 (2d Cir. 2000) 17

Maine v. Thiboutot,
448 U.S. 1 (1980) 19

Miller v. Johnson,
515 U.S. 900 (1995) 19

Moneli v. Department of Social Services,
436 U.S. 658 (1978) 21

Oden v. Oktibbeha County,
246 F.3d 458 (5th Cir. 2001) 21

Patterson v. County of Oneida,
375 F.3d 206 (2d Cir. 2004) 22

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 11, 13

Raymond B. Yates M.D., P.C. Profit Sharing Plan v. Hendon,
541 U.S. 1 (2004) 16

Cited Authorities

Page

Rivers v. Roadway Express Inc.,
511 U.S. 298 (1994) 7

Runyon v. McCrary,
427 U.S. 160 (1976) 7

Shaikh v. City of Chicago,
341 F.3d 627 (7th Cir. 2003) 12, 13, 20

Spriggs v. Diamond Auto Glass,
165 F.3d 1015 (4th Cir. 1999) 12

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 8, 14

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 16

Tillman v. Wheaton-Haven Recreation Association,
410 U.S. 431 (1973) 8, 13

United States v. Burke,
504 U.S. 229 (1992) 11

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 17

Washington v. Davis,
426 U.S. 229 (1976) 19, 20

Cited Authorities

Page

Will v. Michigan Department of State Police,
491 U.S. 58 (1989) 22

Wilson v. Garcia,
471 U.S. 261 (1985) 9, 10

FEDERAL STATUTES

26 U.S.C. § 3121(d)(1) 15

26 U.S.C. § 3306(i) 15

26 U.S.C. § 3401(c) 15

42 U.S.C. § 1981 ..... *passim*

42 U.S.C. § 1982 ..... 7, 14

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1985 14

Cited Authorities

Page

MISCELLANEOUS

Barry Sullivan, *Reconstructing Reconstruction: Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541 (1989) 8-9

Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1867* (1988) 8

George Rutherglen, *The Improbable History of Section 1981*, 2003 Sup. Ct. Rev. 303 ..... 8, 9

U.S. Census Bureau, 1997 Economic Census, Survey of Minority-Owned Business Enterprises (Company Statistic Series) (2001), *available at* http://www.census.gov/prod/ec97/ec97cs-7.pdf 2

2 Dan B. Dobbs, *The Law of Torts* (2001) 12

2 W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* (1984) ... 12

INTERESTS OF THE *AMICI CURIAE* STATES

At issue in this case is whether the broad anti-discrimination protections contained in 42 U.S.C. § 1981 apply to a plaintiff's claim that he was the target of racial discrimination by a defendant with whom he does not have a contractual relationship. Section 1981 derives from the nation's oldest civil rights statute, the Civil Rights Act of 1866, and it provides an essential remedy for plaintiffs who are subjected to intentional racial discrimination that interferes with their contractual relationships.

Ensuring that all of their citizens can attain full participation in economic life free from discrimination is an interest of the highest order for the amici States. As the chief law enforcement officers of their respective States, the amici attorneys general undertake numerous enforcement efforts in furtherance of that goal. In so doing, they rely in no small part on federal statutes such as section 1981, which provide broad guarantees of equality buttressed by remedial regimes. *See, e.g., General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (State acting as parens patriae to seek redress for discrimination in private employment). Indeed, in many instances, including the one presented by this case, section 1981 provides the only federal cause of action available to combat private discrimination in business activities.

A rule restricting enforcement of the rights guaranteed in section 1981 to the corporate signatories to business contracts, or to the express third-party beneficiaries of those contracts, would significantly undermine the States' interest in eliminating racial discrimination in the marketplace. In many instances where a person breaches a contract with a

sole shareholder's corporation in an effort to target the shareholder for racially discriminatory reasons, that conduct will not simply disrupt the corporation's contractual relationship with the discriminating actor, but also the shareholder's own relationship with the corporation. To prohibit a shareholder's recovery for that injury would render the human target of discrimination unable to redress his uniquely personal injuries, and would allow the discriminating actor to escape the full costs of his behavior.

Such a rule also places minority business owners in the untenable - and unequal - position of having to forgo the full protections of section 1981 in order to obtain the advantages of incorporation. The consequences would be substantial. Minority-owned businesses constitute an important part of the national economy, as well as the economies of the States. In 1997, the year of the last census tally, minority-owned non-farm businesses made up 14.6% of all U.S. businesses and generated revenues totaling $591 billion. *See* U.S. Census Bureau, 1997 Economic Census, Survey of Minority-Owned Business Enterprises (Company Statistic Series) at 10 (2001), *available at* http://www.census. gov/prod/ec97/ec97cs-7.pdf. Not surprisingly, 72.7% of those revenues were generated by incorporated businesses. *Id.* at 13.

SUMMARY OF THE ARGUMENT

Domino's disregards the text and history of section 1981 in arguing that the statute does not protect the right to "make and enforce contracts" free from discrimination unless a plaintiff is in privity of contract with the defendant or, perhaps, is a third-party beneficiary of a contract with the defendant. Pet. Br. 25-26. Section 1981 contains no such limitation. Instead, it also encompasses discriminatory conduct that interferes with a plaintiff's contractual relationships with entities or individuals other than the defendant. Contrary to Domino's characterization, such a plaintiff is not a "bystander" to discrimination and thus outside the scope of section 1981's protections, Pet. Br. 37, but rather, as the very target of intentional discrimination that interfered with his contractual relationships, he falls squarely within the statute's protection as it was intended and has been understood.

Nothing in section 1981's text requires that a plaintiff be in privity of contract with a defendant, or that he be a third-party beneficiary of a contract with a defendant, in order to have a cause of action. The history of section 1981 confirms this interpretation. The statute originated in section 1 of the Civil Rights Act of 1866. When Congress was crafting section 1, it had before it abundant evidence of the brutal violence employed by groups such as the Ku Klux Klan and its predecessors to impede the efforts of the newly freed slaves to contract with third parties.

Thus, this Court has long recognized that the injuries against which section 1981 protects are not in the nature of contract-law claims. Rather, they sound in tort, and if a common law analogy needs to be made, claims such as

McDonald's can be likened to tortious interference with contractual relations - which can give rise to liability even if the relationship with which a defendant interfered would not be enforceable by a plaintiff under contract law.

Confirming that section 1981 makes defendants liable for interfering with the contractual relationships of others will not expand liability for the States. A plaintiff who claims that he was the victim of intentional discrimination by the State has available a cause of action for violation of the Equal Protection Clause under 42 U.S.C. § 1983, regardless of whether or not his claim arises in the context of a contractual relationship.

ARGUMENT

POINT I

Section 1981's Protection Against Racially Discriminatory Interference With Economic Activity Encompasses Third-Party Interference Claims

Domino's primary argument is that plaintiffs like McDonald are outside the "zone of interests" protected by section 1981 if they are not a party to, or perhaps an intended beneficiary of, a contract with the defendant. Pet. Br. 7, 25-26. To support this assertion, it repeatedly characterizes section 1981 as providing only a "narrow" cause of action, Pet. Br. 17, limited to suing on "contractual rights" between a plaintiff and a defendant. Pet. Br. 20. However, nothing in the text or history of the statute supports Domino's proposed construction.

While section 1981 is concerned with interference with relationships that are contractual in nature, the injuries against which section 1981 protects are not governed by contract law, but sound in tort. Thus, whether privity of contract exists between a plaintiff and a defendant, or whether a plaintiff can enforce a contract against a defendant, is not determinative of a plaintiff's claim. Instead, the proper focus in a section 1981 action is whether a plaintiff has been subjected to intentional discrimination by the defendant and whether that discrimination has disrupted his economic relationships - even if those relationships are not with the defendant.

Domino's tries to avoid these principles by asserting that this Court has only "suggested" that section 1981 "might permit" plaintiffs to bring claims of third-party interference with their contractual relationships and that, in any event, the only "relevant" contractual relationships alleged for the purposes of McDonald's section 1981 claim were those Domino's had with JWM, the corporation of which he was the sole shareholder and President.[1] Pet. Br. 25, 31. In fact, this Court has explicitly found that section 1981 provides a cause of action to plaintiffs who allege that a defendant has interfered with their contractual relationships with other

---

1. Even if Domino's were correct that the only relevant contracts here are the ones that it shared with JWM, liability might still be found under section 1981. The broad language of section 1981 extends protection to anyone who enjoys the benefits of a contractual relationship. Thus, while under contract law it might be the case that an "incidental" third-party beneficiary of a contract could not recover for its breach, here McDonald was the target and victim of racial discrimination that led to the demise of the contracts between JWM and Domino's. As such, he is in no way "incidental" with respect to a section 1981 race discrimination claim.

parties. And Domino's exclusive focus on its own contracts with JWM is a red herring. Where a complaint pleads facts that constitute indicia of an employment relationship between a sole shareholder and his corporation, this relationship may comprise "economically significant activity," *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987), with contractual dimensions sufficient to come within section 1981's protections.

A. The Text and History of Section 1981 Confirm That It Protects the Right to Enjoy Contractual Relationships with Third Parties Free from Racially Motivated Interference.

Nothing in the text of section 1981 supports Domino's argument that an individual may sue under the statute only if he is a party to a contract with the defendant, or a third-party beneficiary of such a contract. Rather, the statute also applies where the plaintiff alleges that the defendant has interfered with his contractual relationships with parties other than the defendant.

The heart of section 1981 is found in subsection (a) of the statute, which provides in pertinent part:

> (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

42 U.S.C. § 1981(a). In 1991, Congress amended section 1981 to reiterate that its protections sweep broadly and extend

to the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *see also Rivers v. Roadway Express Inc.*, 511 U.S. 298, 304 (1994) (section 1981 "covers *all* contracts") (emphasis in original). As is evident from the face of the statute, where a plaintiff seeks to recover for the injuries that flowed from a third party's racially motivated interference with his contractual relationships, he is protected by the express terms of section 1981, since the right to "make and enforce" contracts, as broadly defined by Congress, is obviously impaired by such interference. Domino's essentially asks this Court to read the phrase "with the defendant" into the pertinent portions of the text, but had Congress wanted to limit the statute in this manner it no doubt could have done so.

Domino's cramped interpretation of section 1981's text is also belied by the statute's history, which demonstrates that the statute was intended to encompass and remedy the injuries caused by racially discriminatory third-party interference with an individual's contractual rights. Section 1981, along with its sister statute 42 U.S.C. § 1982,[2]

2. Section 1982 provides to "[a]ll citizens of the United States . . . the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. Because section 1981 and section 1982 both derive from section 1 of the Civil Rights Act of 1866, this Court has found the legislative history of section 1 to be applicable to both provisions and has held the breadth of the two statutes to be similar. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 173-74 (1976) (relying on cases construing section 1982 to hold that section 1981 also applies to private discrimination); (Cont'd)

originated in section 1 of the Civil Rights Act of 1866, which was a far-reaching enactment representing Congress's "first attempt to give meaning to the Thirteenth Amendment, to define in legislative terms the essence of freedom." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1867*, at 244 (1988). It was described at the time of its passage as "'one of the most important bills ever presented to [Congress] for its action.'" *Id.* at 243 (quoting Congressman Henry J. Raymond). In light of its importance, this Court has previously instructed, with respect to the rights protected in section 1, that "history leaves no doubt that, if we are to give the law the scope that its origins dictate, we must accord it a sweep as broad as its language." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (brackets omitted); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (same); George Rutherglen, *The Improbable History of Section 1981*, 2003 Sup. Ct. Rev. 303, 335 ("the sweep of section 1981 . . . embrac[es] all contracts regardless of who makes them, what they concern, or how much they are worth").

As Congress was well aware during the passage of the Reconstruction statutes, one of the primary impediments to the realization of economic opportunity for the newly freed slaves was the pernicious interference by third parties with their ability to engage in economic transactions. *See* Barry Sullivan, *Reconstructing Reconstruction: Historical*

(Cont'd)

Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-40 (1973) (construing sections 1981 and 1982 similarly "in light of the historical interrelationship"); *Johnson v. Railway Express Agency*, 421 U.S. 454, 471 (1975) (Marshall, J., concurring in part and dissenting in part) (noting that legislative history of statutory origins of section 1982 is applicable to section 1981).

Reconstruction, Reconstruction History, and the Proper Scope of Section 1981, 98 Yale L.J. 541, 552 (1989). When drafting and debating section 1 of the Civil Rights Act of 1866, Congress considered detailed reports recounting "a pattern of private violence . . . aimed at preventing the Freedmen from exercising their new rights." *Id.* at 553. For example, testimony before Congress

> confirmed that violence was frequently used to compel the Freedmen to work for their former masters: "[F]reedmen [who] have gone from one county to another and made contracts . . . were brought back by men with their faces blackened, who whipped them and ordered them not to leave again . . . even when they were under no contract with their former masters."

Id. at 555 n.95 (quoting H.R. Rep. No. 39-30, pt. iii, at 143) (alterations in original); *see also id.* at 553 (abundant evidence before the framers of the 1866 Act of violence and intimidation used to prevent Freedmen from exercising their newly granted rights); *cf. Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (catalyst for enforcement provisions provided by the 1871 Civil Rights Act, from which section 1983 derived, was campaign of violence and intimidation by groups like Ku Klux Klan in order to interfere with African-Americans' exercise of rights); Rutherglen, *supra*, 2003 Sup. Ct. Rev. at 319 (noting Congress's concern about the intimidation campaigns of groups such as the Ku Klux Klan when enacting the Reconstruction-era civil rights statutes).

B. That Section 1981 Is a "Tort-Like" Cause of Action Confirms That It Encompasses Interference With a Plaintiff's Contract with a Third Party.

In keeping with Section 1981's historical context and the sweep of its language, this Court has confirmed that the statute does not embody a contract-law cause of action, but addresses injuries that are tortious in nature. In *Goodman* - a case that Domino's and its amici fail to cite - this Court considered the question of which state statute of limitations period should be borrowed for actions brought under section 1981: limitations periods governing personal injury actions, or those governing contract actions.

The petitioners in *Goodman* argued that the period governing contract actions should apply because, they submitted, "§ 1981 deals primarily with economic rights, more specifically the execution and enforcement of contracts." 482 U.S. at 661. The Court rejected that characterization. Instead, the Court extended its prior holding in *Wilson v. Garcia*, that claims arising under 42 U.S.C. § 1983 should borrow state statutes of limitations governing personal injury actions. The Court explained:

> Section 1981 has a much broader focus than contractual rights. . . . Its heading was and is "Equal rights under the law" and is contained in a chapter entitled "Civil Rights." Insofar as it deals with contracts, it declares the personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds. . . . It is thus part of a federal law barring

> racial discrimination, which . . . is a fundamental injury to the individual rights of a person. . . . That § 1981 has far-reaching economic consequences does not change this conclusion, since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

Id. at 661-62; *see also id.* at 681 (Powell, Scalia, O'Connor, JJ., concurring in application of personal injury statute of limitations); *cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 182 (1989) (rejecting view that section 1981 "has no actual substantive content, but instead mirrors only the specific protections that are afforded under the law of contracts of each State").

This Court has subsequently reaffirmed that section 1981 protects against tort-like injuries. *See United States v. Burke*, 504 U.S. 229, 239-40 (1992) (in contrast to Title VII, section 1981 "evidenced a tort-like conception of injury and remedy," and thus section 1981 awards would likely be excludable from gross income under relevant provisions of the Internal Revenue Code); *see also id.* ("'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort'") (quoting *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974)).

Because a section 1981 claim sounds in tort, whether a plaintiff is a formal party to any contract, or has enforcement rights under a contract with the defendant, is not necessarily determinative of his claim. *See Burke*, 504 U.S. at 234 (a tort is a "civil wrong, *other than* breach of contract") (emphasis added). Instead, claims like McDonald's can be compared to the traditional torts of intentional interference

with contractual relations and intentional interference with prospective contractual relations, which are actionable even if the economic relationships a plaintiff seeks to vindicate could not be enforced by the plaintiff as a contract. *See* 2 W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 978, 994-95 (1984); 2 Dan B. Dobbs, *The Law of Torts* 1257, 1275 (2001).

Similarly, the personal injury that a section 1981 plaintiff suffers when a defendant interferes with his contractual relationships out of racial animus directed towards him does not turn on the violation of a particular contract right. *See, e.g., Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1020 (4th Cir. 1999) (Section 1981 plaintiffs are not required to "prove that [a] discriminatory act violated a specific contract right," and "[p]roving breach of the underlying contract is . . . [not] necessary to a successful § 1981 claim."); *see also Shaikh v. City of Chicago*, 341 F.3d 627, 631 (7th Cir. 2003) ("[T]he concept of third-party interference with contractual business relationships is not novel; it is a well-recognized common-law tort. And that tort is essentially what [the section 1981 plaintiff] complains about here. . . .").

Fully cognizant of the nature of the injuries that section 1981 is intended to remedy, this Court has applied it to claims that a defendant interfered with a plaintiff's economic or contractual relationships with others. In *Goodman*, the Court found that a union was liable under, *inter alia*, section 1981 where it failed to assert grievances of African-American union members regarding racial discrimination by the employer steel company. 482 U.S. at 668. In that case, there was no contractual relationship between the defendant union and the plaintiff employees. Rather, the contractual relationships that gave rise to the union's liability to the

employees were a collective bargaining agreement between the union and the employer and the employment relationship between the employees and the employer. *See id.* at 668-69; *see also Patterson*, 491 U.S. at 177 (noting that in *Goodman*, contractual obligations ran from employer to employee). Nor did the Court premise the union's liability to the plaintiffs on any contract theory - such as third-party beneficiary status - but simply found that by refusing to bring the employees' race discrimination claims against the employer, the union "intentionally discriminated against blacks . . . based on their race and violated . . . § 1981." *Goodman*, 482 U.S. at 669.

Similarly, in *Tillman v. Wheaton-Haven*, this Court reinstated the section 1981 claims of both the white members of a community swimming pool association and their African-American guest who was excluded by virtue of a racially discriminatory guest policy enacted after her hosts sought to bring her to the club. 410 U.S. 431, 439-40 (1973). The Court remanded the case for further development in the district court "free of the misconception" that the defendant pool association was exempt from section 1981. *Id.* at 440. Implicit in the Court's reinstatement of the section 1981 claim was the conclusion that even though the African-American guest was not a party to a contract with the defendant, this fact would not, as a matter of law, preclude her from bringing a claim under section 1981.[3]

---

3. The lower courts have applied section 1981 similarly. *See Shaikh*, 341 F.3d at 630 ("a third party's interference with an individual's equal opportunity to enter into contracts . . . can support civil rights claims under § 1981"); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir. 1992) (a plaintiff's claim that a defendant impaired his ability to enter into contracts with third parties is ordinarily sufficient to state a claim under section 1981); *Daniels*

(Cont'd)

The Court's decision in *Goodman* and its remand in *Tillman* are consistent with its interpretation of 42 U.S.C. § 1982, a closely related civil rights statute, *see supra* at 7 n. 2. In *Sullivan*, the Court held that section 1982 protects plaintiffs against a defendant's discriminatory interference with their efforts to lease property from third parties. In *Sullivan*, a corporation operating a community park for the benefit of local homeowners was liable to both a white homeowner and his African-American tenant when the corporation refused to permit the homeowner to assign his membership share in the park to the tenant and expelled the homeowner from membership. 396 U.S. at 234-35. This Court rejected the notion that privity between lessors and lessees was required to maintain an action under section 1982: "The right to 'lease' is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor." *Id.* at 237.

Analogously, this Court found that a plaintiff stated a claim for damages under 42 U.S.C. § 1985(2) - which proscribes intimidation or retaliation against witnesses in federal court proceedings by injury to their "person or property" - where third parties against whom he had testified conspired to have him fired from his at-will employment. *Haddle v. Garrison*, 525 U.S. 121, 125-27 (1998). The Court explained that "third party interference with at-will

---

(Cont'd)

v. Pipefitters' Ass'n Local Union No. 597, 945 F.2d 906, 914 (7th Cir. 1991) (rejecting union's argument that it could not be liable for discriminatory interference with an African-American member's ability to enter into contracts with others: "To hold otherwise would impose a sort of § 1981 privity of contract requirement that would effectively protect third parties . . . from § 1981 liability.").

employment relationships . . . has long been a compensable injury under tort law" as "merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations." *Id.* at 126.

C. Sole Shareholders Should Not Be Precluded from Bringing a Claim Under Section 1981.

Domino's failure to appreciate the scope and purpose of section 1981's protections leads it to repeatedly assert that the only contractual relationships that can be seen as "relevant" to McDonald's claims under section 1981 are the contracts between itself and JWM. Pet. Br. 25. This contention fails to properly apprehend the nature of the relationship that a sole shareholder may have with his own corporation.

Where an individual, as sole shareholder and officer of his corporation, is expected to discharge the functions of the corporation and receives wages and benefits for his performance of those obligations and other services, he should not be precluded from bringing a claim under section 1981. The relationship such a shareholder enjoys with the corporation can be viewed as employment-like, and as having contractual dimensions for the purposes of recovery under section 1981. Indeed, for a variety of federal tax purposes, the Internal Revenue Code expressly directs that a corporate officer is an "employee" of his corporation. *See* 26 U.S.C. § 3121(d)(1) ("For the purposes of this chapter, the term employee means - (1) any officer of a corporation. . . ."); *id.* §§ 3306(i), 3401(c) (same for federal unemployment taxes and federal income tax withholding purposes).

This Court has likewise recognized that a president and sole shareholder of a corporation can be an employee of the corporation for the purposes of defining the scope of various federal statutes. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (considering claims against president and sole shareholder and concluding that "the RICO provision before us applies when a corporate employee unlawfully conducts the affairs of a corporation of which he is the sole owner"); *Raymond B. Yates M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004) (working owner who was sole shareholder and president of business was an "employee" for purposes of participation in benefit plan under Title I of ERISA); *see also id.* at 26 (Thomas, J., concurring) (observing that "I would be surprised" if "common-law understanding of term 'employee'" did not cover sole shareholder and president of corporation in such circumstances).

Similarly, an individual like McDonald reasonably could be viewed as sharing a contractual relationship with JWM for the purposes of his section 1981 claim. McDonald's complaint indicates that he was the sole shareholder and president of JWM, that he personally performed the tasks required to fulfill JWM's contractual obligations, and that he received remuneration in the form of wages and benefits for his performance. The complaint further indicates that McDonald's ability to continue to do so was destroyed when, because of McDonald's race, Domino's tried to "bury" him and his company, culminating in the breach of Domino's contracts with JWM and JWM's dissolution. App. 11–14, 17.[4]

---

4. Amici take no position on the ultimate merit of McDonald's claims, but in appraising his complaint with respect to these issues, this Court must, of course, accept as true all of the facts alleged. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

McDonald's relationship with his corporation might also be analogized to that of an at-will employee who does not have a formal employment contract of a fixed duration and whose employment is terminable at any time. As this Court has observed, at-will employment may constitute a "valuable contract right." *Haddle*, 525 U.S. at 127. The circuit courts that have considered the issue have been nearly unanimous in extending section 1981's protections to at-will employment relationships. *See, e.g., Lauture v. IBM Corp.*, 216 F.3d 258, 259-60 (2d Cir. 2000) (at-will employee can sue for racially discriminatory discharge under section 1981) (collecting cases).

Recognizing that a "valuable contract right" exists here sufficient to invoke section 1981's antidiscrimination protections would further, not subvert, the goals of section 1981. If sole shareholders and officers like McDonald are precluded from bringing such claims on the ground that they have no cognizable contractual relationship with their corporations, third parties who breach contracts with corporations out of racial animus directed at the sole shareholders/officers will not bear the full cost of their discrimination. For example, though a corporation has standing to sue under section 1981, *see, e.g., Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 770 (9th Cir. 2005), it may recover only for the damages to the corporation and not for the separate damages suffered by its owners or employees. *Id.*

Moreover, affording a remedy under section 1981 to the corporation for its losses but not to the victim for his or hers would be anomalous because corporations do not have a race. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). Instead, a corporation

generally will have standing to sue under section 1981 only if it is treated as having the "imputed" race of someone associated with it. *See, e.g., Bains*, 405 F.3d at 770; *accord Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002). It therefore makes no sense to give only the corporation a cause of action under section 1981, but not the person who is the target of discrimination, which is essentially what Domino's advocates when it repeatedly asks this Court to view targets of racial discrimination as suffering injuries that are merely "collateral" or "incidental" to those suffered by their corporations.

Absent a remedy under section 1981, minority business owners will have to trade off their interest in availing themselves of the numerous benefits of incorporation against their statutorily guaranteed, personal right to be free of racial discrimination when engaging in economic activity. Such a barter would hardly constitute the "same right" to "make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

POINT II

The Ninth Circuit's Decision Does Not Expand The States' Liability For Intentional Discrimination

The Ninth Circuit's decision in no way imposes additional liability on the States. *See* Brief of Amici Curiae Alabama et al. at 1-2 (arguing otherwise). Because States are already liable under 42 U.S.C. § 1983 for intentional acts of discrimination based on race - regardless of whether or not that discrimination occurs in the context of a contractual relationship - in practice, the rule espoused by the Ninth Circuit will affect the scope of liability only in suits involving private racial discrimination.

It is well established that section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights secured by the Constitution and laws of the United States. Section 1983 provides in relevant part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. Standing alone, section 1983 does not confer any substantive rights, *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979), but only ensures that individuals have a remedy for violations of their constitutional and federal statutory rights. *See Maine v. Thiboutot*, 448 U.S. 1, 4-5 (1980).

This would include, of course, a violation of the Fourteenth Amendment's Equal Protection Clause, on which a plaintiff can also rely to redress actions that would constitute a violation of section 1981. As this Court has held, "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Miller v. Johnson*, 515 U.S. 900, 904 (1995) ("central mandate [of Equal Protection Clause] is racial neutrality in governmental decisionmaking"). While section 1981 and the Equal Protection Clause are similar in that both reach only

purposeful racial discrimination, *see General Bldg. Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982) (section 1981); *Washington*, 426 U.S. at 239 (Equal Protection Clause), unlike section 1981, the Equal Protection Clause is not limited to redressing discrimination that occurs in the context of the right to make and enforce contracts. Thus, a plaintiff can always bring a section 1983 action alleging that the government has violated the Equal Protection Clause through race discrimination, regardless of whether he is able to prove interference with a contractual relationship sufficient to satisfy section 1981. *See Shaikh*, 341 F.3d at 634; *see also Goodman*, 482 U.S. at 661 ("§ 1983 would reach state action that encroaches upon the rights protected by § 1981"). Accordingly, the interpretation of scope of the "make and enforce contracts" language contained in section 1981 will not expand a State's liability for intentional discrimination.

For example, in *Shaikh*, the Court of Appeals for the Seventh Circuit noted that section 1983 might be available to remedy a claim of intentional racial discrimination even if section 1981 is not. In that case, the court rejected the plaintiff's section 1981 claim that city officials had interfered with his ability to contract for property on account of his race, finding that the city's alleged discriminatory action did not in fact interfere with his ability to contract for the property. 341 F.3d at 634. Nonetheless, the court stated that it was "conceivable that the City's statements - although of no ultimate effect upon Shaikh's ability to proceed with the transaction - could nevertheless constitute invidious racial, religious, ethnic, or other discrimination action under section 1983" because section 1983 does not contain the "contractual element" found in section 1981. *Id.*

Additionally, because a plaintiff can sue a State for a section 1981 violation only by bringing an action for damages under section 1983, affirming the decision below will not deprive the States of defenses or limitations on liability that they would otherwise have. In *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989), this Court held that section 1981 does not provide an independent cause of action for racial discrimination by government actors. Instead, section 1983 "constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state units." *Id.* at 733. For this reason, the well-established limitations on government liability that section 1983 imposes will apply to a section 1981 claim brought against a State. Thus, the *Jett* Court held that, like section 1983, state-actor liability under section 1981 could not be premised on a theory of respondeat superior, but instead, to prevail, a petitioner seeking to vindicate his "right to make contracts protected by § 1981" must also demonstrate that the violation "was caused by a custom or policy within the meaning of" *Monell v. Department of Social Services*, 436 U.S. 658 (1978), as section 1983 requires.[5] *Jett*, 491 U.S. at 735-36.

---

5. Congress amended section 1981 in 1991 to add a subsection expressly providing that the statute applied to private discrimination as well as to discrimination arising "under color of state law." 42 U.S.C. § 1981(c). The majority of circuits to have considered the question directly have held that this amendment did not overrule *Jett*'s holding that section 1983 provides the exclusive federal remedy for a section 1981 violation. *See, e.g., Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000) (1991 amendment to section 1981 does not evince an intent by Congress to alter holding in *Jett*); *Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir. 2001) (same); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995) (same). *But see Federation of African Am. Contractors v. City of*

(Cont'd)

Of course, actions brought under section 1983 are subject to a range of other restrictions that protect States. For example, this Court has held that the Eleventh Amendment bars section 1983 suits against the States in federal court, including those alleging a violation of the Fourteenth Amendment's Equal Protection Clause. *See Edelman v. Jordan*, 415 U.S. 651, 655-56, 662-63 (1974). Similarly, the Eleventh Amendment limits federal-court suits against state officers to those seeking prospective relief. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), this Court held that States are not "persons" for the purposes of section 1983 and therefore may not be sued under that statute in state courts. As in federal court, state officials may not be sued in their official capacity in state courts for money damages to be paid out of the state coffers. *Id.* at 71. But even when a section 1983 suit for damages might be available against a state actor acting in his individual capacity, this Court has made clear that qualified immunity is available because "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

(Cont'd)

Oakland, 96 F.3d 1204, 1205 (9th Cir. 1996) (concluding that addition of subsection (c) to section 1981 overturned *Jett*'s holding). Other circuits, while not explicitly addressing the issue, have continued to apply *Jett*'s holding post-amendment. *See, e.g., Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1181 (8th Cir. 1998). In any event, even the Ninth Circuit agrees that the limitations on section 1983 liability continue to apply identically to claims arising under section 1981. *Federation of African Am. Contractors*, 96 F.3d at 1215.

These limitations on suit against the States under section 1983, and derivatively under section 1981, flow either from constitutional imperatives - as with the Eleventh Amendment bar - or, with respect to qualified immunity, from the "important assumption . . . that members of the [] Congress [that enacted section 1983] were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Nothing in the decision below alters or calls into question these well-founded principles.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CAITLIN J. HALLIGAN*
Solicitor General

MICHELLE ARONOWITZ
Deputy Solicitor General

SHAIFALI PURI
BENJAMIN N. GUTMAN
Assistant Solicitors General

ELIOT SPITZER
Attorney General of the State of New York
120 Broadway
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-3000

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Second Floor
Des Moines, IA 50319
(515) 281-5673

THOMAS F. REILLY
Attorney General
of Massachusetts
One Ashburton Place
Boston, MA 02108
(617) 727-2200

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3173

PEGGY A. LAUTENSCHLAGER
Attorney General of Wisconsin
17 West Main Street
PO Box 7857
Madison, WI 53702-7857
(608) 266-1220

KERRY E. DRUE
Acting Attorney General of
the Territory of the Virgin Islands
34-38 Kronprindsens Gade
GERS Complex, 2nd Floor
St. Thomas,
U.S. Virgin Islands 00802
(340) 774-5666

Attorneys for Amici Curiae

Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-593

In the
Supreme Court of the United States

DOMINO'S PIZZA, LLC; DOMINO'S PIZZA, INC.; and DEBBIE PEAR

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

JOHN H. FINDLEY
Counsel of Record
PAUL J. BEARD II
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. CONGRESS INTENDED TO LIMIT THE APPLICATION OF § 1981 TO THE CONTRACTING PARTIES 2

II. AN EXPANSION OF LIABILITY TO THIRD PARTIES UPSETS THE SANCTITY OF CONTRACTUAL EXPECTATIONS 4

A. McDonald Is Not a Party to the Contract 6

B. McDonald Is Not an Intended Beneficiary of the Contract Between JWM Investments and Domino's 7

C. Expanding § 1981 Liability to Include an Incidental Third Party Beneficiary Produces Uncertainty in Contracting and Negatively Impacts Economic Development 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Allen v. Prudential Property & Casualty Insurance Co., 839 P.2d 798 (Utah 1992) 10-11

Bellows v. Amoco Oil Co., 118 F.3d 268 (5th Cir. 1997) 4

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (1st Cir. 1999) 4

Davis v. Nev. Nat'l. Bank, 737 P.2d 503 (Nev. 1987) 9

Deckard v. General Motors Corp., 307 F.3d 556 (7th Cir. 2002) 3

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) 6

Elizabeth E. v. ADT Security Systems West, Inc., 839 P.2d 1308 (Nev. 1992) 5

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004) 1

General Building Contractors Ass'n. v. Pennsylvania, 458 U.S. 375 (1982) 2

German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220 (1912) 4-5

Gomez v. Alexian Bros. Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983) 11

Grigerik v. Sharpe, 721 A.2d 526 (Conn. 1998) 9-10

Jackson v. Birmingham Board of Education, 125 S. Ct. 1497 (2005) 1

TABLE OF AUTHORITIES—Continued

Page

Kyles v. J.K. Guardian Security Services, Inc.,
222 F.3d 289 (7th Cir. 2000) 4

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 1

McDonald v. Santa Fe Trail Transportation Co.,
427 U.S. 273 (1976) 2

Morrissey v. Commissioner of Internal Revenue,
296 U.S. 344 (1935) 6-7

NGA #2 Ltd. Liability Co. v. Rains,
946 P.2d 163 (Nev. 1997) 9

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 3

Randle v. LaSalle Telecomms., Inc.,
697 F. Supp. 1474, (N.D. Ill. 1988),
aff'd, 876 F.2d 563 (7th Cir. 1989) 7

Reisenfeld & Co. v. Network Group, Inc.,
277 F.3d 856 (6th Cir. 2002) 3

The Guides, Ltd. v. The Yarmouth Group Prop. Mgmt., Inc., 295 F.3d 1065 (10th Cir. 2002) 4

Statutes

42 U.S.C. § 1981(b) 3

Nev. Rev. Stat. 78.747 (2001) 7

Miscellaneous

137 Cong. Rec. S15,472-01 (1991) 3

17A Am. Jur. 2d *Contracts* (2005) 5

18 Am. Jur. 2d *Corporations* (2005) 6

TABLE OF AUTHORITIES—Continued

Page

19 Am. Jur. 2d *Corporations* (2005) 11

45C Am. Jur. 2d *Job Discrimination* (2005) 8

Cong. Globe, 39th Cong., 1st Sess., 1159 (1866)
(statement of Rep. Windom) 2

Cooter, Robert, & Eisenberg, Melvin A., *Damages for Breach of Contract*, 73 Cal. L. Rev. 1434 (1985) 8

Easterbrook, Frank H., & Fischel, Daniel R.,
Limited Liability and the Corporation,
52 U. Chi. L. Rev. 89 (1985) 7

Eisenberg, Melvin A., *Third-Party Beneficiaries*,
92 Colum. L. Rev. 1358 (1992) 8

Fleming Powers, Jean, *Expanded Liability and the Intent Requirement in Third Party Beneficiary Contracts*,
1993 Utah L. Rev. 67 (1993) 8

Goetz, Charles J., & Scott, Robert E., *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*,
73 Cal. L. Rev. 261 (1985) 5, 10

Greenwood, Daniel J.H., *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021 (1996) 7

Kostritsky, Juliet P., *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*,
44 Hastings L.J. 621 (1993) 5

Kronman, Anthony T., & Posner, Richard A.,
The Economics of Contract Law
(Little, Brown & Co. 1979) 8

TABLE OF AUTHORITIES—Continued

Page

Paglin, Orna S., *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Eng. L. Rev. 63 (1989) 5, 10-11

Popik, Susan M., & Quackenbos, Carol D., *Reasonable Expectations after Thirty Years: A Failed Doctrine*, 5 Conn. Ins. L.J. 425 (1998) ... 10-11

Posner, Richard A., *Economic Analysis of Law* (Little, Brown & Co. 1992) 10

Reed, O. Lee, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 Am. Bus. L. J. 441 (2001) 10

Restatement (Second) of Contracts (1981) 8

Thornburgh, Dick, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 Md. L. Rev. 1074 (1996) 10

Ware, Stephen J., *A Critique of the Reasonable Expectations Doctrine*, 56 U. Chi. L. Rev. 1461 (1989) 11

INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF attorneys actively engage in research and litigate over a broad spectrum of public interest issues nationwide. PLF submits this brief because it believes its public policy perspective and litigation experience will provide a valuable viewpoint. PLF has participated in other cases before this Court, including *Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005); *Elk Grove Unified Sch. District v. Newdow*, 542 U. S. 1 (2004); and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

SUMMARY OF THE ARGUMENT

As a third party to the contracts between Domino's and JWM Investments, McDonald does not have a cause of action for personal injuries under 42 U.S.C. § 1981 for two reasons. First, the plain language of § 1981 protects only parties who have a potential or actual contractual relationship. Congress intended to limit the application of § 1981 to those who have the right to make or enforce the terms of the contract.

Second, as a matter of policy, courts should not disturb the contractual expectations of parties. As the owner of the contracting corporation, McDonald does not have his own

---

[1] Pursuant to this Court's Rule 37.3 (a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

contract with Domino's, nor is McDonald an intended third party beneficiary of the contracts between JWM Investments and Domino's. Expanding the liability of Domino's to include McDonald's claims under § 1981 increases the amount of uncertainty involved in the formation of contracts and would have a negative economic impact on small businesses.

ARGUMENT

I

CONGRESS INTENDED TO LIMIT THE APPLICATION OF § 1981 TO THE CONTRACTING PARTIES

Title 42 U.S.C. § 1981 was originally enacted as § 1 of the 1866 Civil Rights Act and provides the right to "make and enforce contracts" without racial discrimination. "The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 386 (1982). The central theme of § 1981 is "to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 295 (1976). Congressman Windom described the rights contained in § 1981 as securing "to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil." Cong. Globe, 39th Cong., 1st Sess., 1159 (1866) (statement of Rep. Windom). Representative Lawrence stated: "It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby he alone can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor." *Id.* at 1833.

In 1991, Congress amended § 1981 to define expressly the meaning of "to make and enforce contracts." 42 U.S.C. § 1981 (b). The purpose of the amendment was to overturn *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989),[2] by establishing that § 1981 prohibits discrimination during the making, enforcement, *and performance* of all contracts. 137 Cong. Rec. S15472-01 (1991). The amendment provides "a remedy for any act of intentional discrimination committed in the making or the performance of a contract." *Id.* This includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Although contracting parties may give a third party enforcement rights under a contract that gives rise to a § 1981 cause of action, the third party must prove the contracting parties' intent to bestow such rights in his favor; the purpose of the contract must impose an obligation on one of the contracting parties in favor of the third party. *Deckard v. General Motors Corp.*, 307 F.3d 556, 561 (7th Cir. 2002); *Reisenfeld & Co. v. Network Group, Inc.*, 277 F.3d 856, 863 (6th Cir. 2002). Thus, Congress intended relief to focus on the potential or actual existence of a contractual relationship between the parties.

Most courts have also found that relief under § 1981 depends on the existence of a contractual relationship. The Seventh Circuit explained that § 1981 "protects the right to enter into and preserve a contractual relationship, period. Moreover, there is nothing in section 1981's language

---

[2] In *McLean*, a black former employee of a credit union brought a § 1981 suit against the credit union, claiming it harassed her, failed to promote her, and discharged her because of race. The United States Supreme Court held, *inter alia*, that racial harassment in the course of employment was not actionable under § 1981, which covered only conduct at the initial formation of a contract and conduct that impairs the right to enforce contractual obligations through the legal process. *Id.* at 179-80.

suggesting that Congress meant to stretch standing to the limits of Article III." *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289, 303 (7th Cir. 2000). *See also, Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999) (finding that the same statutory language in § 1981 that provides a claim to the corporation contracting with the Defendant, precludes such a claim by the Plaintiff, the owner of the corporation, unless he also had a contract with the Defendant); *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 276 (5th Cir. 1997) (explaining that because the Plaintiff's claim against the Defendant was merely derivative of the contracting corporation's cause of action, the Plaintiff had no individual § 1981 claim against the Defendant); *The Guides, Ltd. v. The Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072-73 (10th Cir. 2002) (stating that the Plaintiff's "claim is derivative of that of [her corporation] and she does not have standing to sue on her own behalf [under § 1981]").

The plain language of § 1981 does not provide an incidental third-party the right to sue for injuries that are merely derivative of those rights that could be enforced by a party to the contract. Thus, it is the parties to a contract that are protected by § 1981; the intent of the parties to the contract is where the statute's protections should begin and end. Accordingly, this Court must dismiss McDonald's third party claim for personal injuries under the contract between JWM Investments and Domino's.

II

AN EXPANSION OF LIABILITY TO THIRD PARTIES UPSETS THE SANCTITY OF CONTRACTUAL EXPECTATIONS

McDonald does not have an individual contractual relationship with Domino's. A general principle of contract law limits the right to enforce contracts by providing that "a contract is only intended for the benefit of those who made it."

German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 230 (1912). Lacking any contractual relationship with Domino's, McDonald seeks to leverage his position as sole shareholder of JWM Investments into an intended third-party beneficiary of JWM's contract. But the provision in contract law allowing suits by third party beneficiaries applies only when the contract is made expressly for the benefit of the third party, not when the third party is incidentally benefitted. *Id. Elizabeth E. v. ADT Security Systems West, Inc.*, 839 P.2d 1308, 1311 (Nev. 1992); 17A Am. Jur. 2d *Contracts* § 447 (2005). The predictability of contracting and assessing potential liability is greatly diminished by a ruling that grants an incidental third party to a contract the right to sue under a statute protecting the right to contract free from discrimination, and business costs consequently rise. *See* Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 Hastings L.J. 621, 681 (1993) (explaining that when parties negotiate "in a state of uncertainty, the promisee who perceives a risk of bearing uncompensable reliance cost will insist on more favorable terms to offset those costs and risks"); Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Eng. L. Rev. 63, 105-111 (1989) (arguing for the use of economic criteria in the recognition of a third party's right to enforce a contract—*e.g.*, whether an award of relief to the third party might be burdensome on a promisor who did not foresee the possibility of being sued by the third party); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 265-67 (1985) (discussing the importance of adhering to the intent of the parties because reliability is the central concern of the contractual process).

A. McDonald Is Not a Party to the Contract

McDonald is attempting to disregard the corporate entity he created, and use the corporate form both as a shield and sword at his will. A corporation and its shareholders are distinct parties, with distinct rights and obligations under the law. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *see also* 18 Am. Jur. 2d *Corporations* § 44 (2005) ("The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs."). JWM Investments has already settled its claim with Domino's. In his complaint, McDonald characterizes JWM Investments as his alter-ego. For example, McDonald's first cause of action states that "McDonald acting for JWM had contracts with Domino's, which contained all of the essential elements of a valid contract . . . ." Petition Appendix at 15. (Pet. App.) Later McDonald states: "McDonald accepted that offer by JWM's construction of the restaurants . . . ." Pet. App. at 15. The complaint continues, "McDonald's performance through JWM of services for Domino's served as consideration for Domino's promise to pay him for his services." Pet. App. at 15. "Domino's promise to lease from McDonald the completed restaurants served as consideration for his performance under the contract." Pet. App. at 16. McDonald is trying to blur the line between himself and his company to bring his individual claim under § 1981. A corporation is a legal construct. It exists on paper as a means of organizing a business. But no piece of paper can sign a lease or construct a restaurant. It takes a person to sign a document; it takes laborers to construct a building and install fixtures. The fact that people are necessary to implement the goals of a corporation does not mean that these people *are* the corporation or vice versa. Thus, a change in the identity of corporate shareholders does not void contracts made in the name of the corporation. *Morrissey v. Commissioner of Internal Revenue*,

296 U.S. 344, 358 (1935); Daniel J. H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021, 1082 (1996) ("[S]tocks are permanent investments in the corporation regardless of the constant changes in the identity of the shareholders.").

By organizing a corporation, McDonald is subject to the disadvantages as well as the advantages afforded by state and federal law to corporations. For example, McDonald benefits from limited liability, which means that he is not personally liable for more than he has invested in the corporation. Nev. Rev. Stat. 78.747 (2001); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89-90 (1985) ("The rule of limited liability means that the investors in the corporation are not liable for more than the amount they invest."). McDonald cannot incorporate his business and then ignore the corporate fiction in an attempt to recover individually under § 1981. Because McDonald and his corporation are distinct entities, McDonald is not a party to the contract between JWM Investments and Domino's and, as shown below, can claim no preferred status to demand its enforcement.

B. McDonald Is Not an Intended Beneficiary of the Contract Between JWM Investments and Domino's

Section 1981 confers upon all persons the same right to make contracts, but only parties to the contract have the right to enforce them. Occasionally, enforcement by third parties carries out the intent of the parties to a contract. A third party may enforce a contract by demonstrating that the intent of the parties is to legally benefit him, but absent third-party beneficiary status, the third party has no standing to sue under § 1981. *E.g.*, *Randle v. LaSalle Telecomms., Inc.*, 697 F. Supp. 1474, 1481 (N.D. Ill. 1988), *aff'd*, 876 F.2d 563 (7th Cir. 1989) (black employees of minority marketing company did not have

standing to assert § 1981 claim that cable company breached its contract to assign white neighborhoods to the marketing company, since contract was between cable company and marketing company, and employees did not demonstrate third-party beneficiary status); *see also* 45C Am. Jur. 2d *Job Discrimination* § 2111 (May 2005) ("[O]nly the parties to a contract, or third-party beneficiaries of a contract, have standing under § 1981 to allege denial of the right to make and enforce contracts."). Courts often distinguish "intended" third party beneficiaries, who can sue under the contract, from "incidental" third party beneficiaries, who cannot, by determining whether the contracting parties intended to confer enforcement rights on the third party. Restatement (Second) of *Contracts* (1981) §§ 302, 304; Jean Fleming Powers, *Expanded Liability and the Intent Requirement in Third Party Beneficiary Contracts*, 1993 Utah L. Rev. 67, 67 (1993) ("Third party beneficiary standing is now an accepted part of American law, with 'intent to benefit' generally recognized as the determinative element in questions of standing.").

Allowing third parties to enforce contracts often conflicts with the ability of contracting parties to create value through exchange and to make reliable plans, two of the primary purposes for enforcing contracts. Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1374 (1992); Robert Cooter & Melvin A. Eisenberg, *Damages for Breach of Contract*, 73 Cal. L. Rev. 1434, 1459-64 (1985); Anthony T. Kronman & Richard A. Posner, The Economics of Contract Law 1-2 (Little, Brown & Co. 1979). An example from the Restatement illustrates this situation. B contracts with A to buy a new car manufactured by C. C is an incidental beneficiary, even though the promise can only be performed if money is paid to C. Restatement (Second) of *Contracts* (1981) § 302 illus. 17. Thus, if B breaches the contract and buys a car from D instead, C should not be able to sue B for its lost profits on the sale of the car.

Like car manufacturer C in the Restatement example, who does not get paid unless A and B perform their contract, McDonald is an incidental beneficiary who was injured because Domino's and/or JWM allegedly did not perform on their contracts. McDonald cannot enforce the contracts or sue Domino's for damages because Domino's and JWM did not intend to benefit McDonald by entering into the contracts. McDonald's company, JWM Investments, has the right to enforce the terms of the contracts with Domino's and to collect damages for any breach of contract. And, in fact, JWM did settle its claims with Domino's. Section 1981 provides an equal right for all people to make and enforce contracts irrespective of race, but McDonald did not personally exercise that right. Therefore, JWM is the party protected under § 1981, and Domino's had no reason to expect that McDonald would be able to sue under § 1981, or any other statute, based on its contracts with JWM Investments.

C. Expanding § 1981 Liability to Include an Incidental Third Party Beneficiary Produces Uncertainty in Contracting and Negatively Impacts Economic Development

Each party to a contract is entitled to know the scope of his or her obligations thereunder. In Nevada, contracts must be interpreted to "'effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself . . . .'" *NGA #2 Ltd. Liability Co. v. Rains*, 946 P.2d 163, 167 (Nev. 1997) (quoting *Davis v. Nev. Nat'l. Bank*, 737 P.2d 503, 505 (Nev. 1987)). This allows parties to enter into contractual arrangements with the confidence that they will not subsequently find themselves legally bound to unknown or unanticipated obligations. *Grigerik v. Sharpe*, 721 A.2d 526, 536 (Conn. 1998). That necessarily includes the range of potential third persons to whom a party may be liable in case of breach. *Id.*

A ruling that grants McDonald the right to sue under § 1981 increases the unpredictability of contracting by imposing nonconsensual liability to a wider range of third parties.

> Rooting the range of potential third parties in the intention of both parties, rather than in the intent of just one of the parties, is a sensible way of minimizing the risk that a contracting party will be held liable to one whom he neither knew, nor legitimately could be held to know, would ultimately be his contract obligee.

Grigerick v. Sharpe 721 A.2d at 536. Paglin, *supra*, at 110 ("While a restrained use of [tort and equity] theories has some merit in the context of commercial transactions, their rampant use may turn a field of consensual liability into a field of imposed liability."). Unknown liability and ambiguity in contracts increase the cost of business. *See* O. Lee Reed, *Law, The Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 Am. Bus. L.J. 441, 461 (2001) ("[K]nowledge of the formal legal effect of contract law facilitates the trust and certainty necessary to place one's resources under the control of strangers . . . . [and] substantially lowers the costs of transacting business."); Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 Md. L. Rev. 1074, 1077 (1996) ("[T]o remain competitive, manufacturers need as much stability in their costs as possible—including predictable liability costs . . . ."); *see also* Charles J. Goetz & Robert E. Scott, *supra* at 265-72; Richard A. Posner, Economic Analysis of Law 107 (Little, Brown & Co. 1992). For example, if public policy concerns or ambiguities in an insurance policy are resolved against the insurance company when settling claims, increased insurance costs are passed along to the insured through increased premiums and restricted coverage. *Id.* Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 Conn. Ins. L.J. 425, 431-32 (1998); *Allen v.*

Prudential Property & Casualty Insurance Co., 839 P.2d 798, 808 (Utah 1992). Similarly, the imposition of nonconsensual liability to a third party exposes the contracting parties to increased costs. Paglin, *supra*, 105-06. Imposing nonconsensual or unchosen liability produces the more lasting social effect of legal and economic uncertainty for parties who seek to make future contracts. *See* Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. Chi. L. Rev. 1461, 1489 (1989) ("[C]lear and objective rules—such as treating one's signature as assent to a contract—promote economic growth since they encourage long-term decisions and investments by giving economic actors confidence that they can predict how the state will use its coercive powers.").

If contracting parties run the risk of having liability imposed on them against their will, they will be more reluctant to engage in such business in the future. Allowing incidental third parties such as McDonald to sue for discrimination under § 1981 increases the likelihood that a party who contracts with a small business will be subject to nonconsensual liability; parties would not only face liability to the company allegedly discriminated against, but also to the company owner for his or her lost income and/or emotional distress. *See, e.g., Gomez v. Alexian Bros. Hospital of San Jose*, 698 F.2d 1019, 1022 n.2 (9th Cir. 1983) (explaining that even though a corporation's sole shareholder sued under § 1981 for interference with a contract proposal, the corporation would still have standing to claim damages for its own injuries). Imposing liability to a third party increases the cost of doing business and conflicts with the general rule that an owner cannot maintain a personal action against a third party for harm caused to the corporation. 19 Am. Jur. 2d *Corporations* § 1937 (2005); Paglin, *supra*, at 105.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

DATED: July, 2005.

Respectfully submitted,

JOHN H. FINDLEY
Counsel of Record
PAUL J. BEARD II
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

FILED
SEP 22 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 04-593

IN THE

Supreme Court of the United States

Domino's Pizza, LLC; Domino's Pizza, Inc.;
and Debbie Pear,

Petitioners,

v.

John McDonald.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT

Eric Schnapper
SCHOOL OF LAW
UNIVERSITY OF WASHINGTON
P.O. Box 353020
Seattle, WA 98185

Allen Lichtenstein
(Counsel of Record)
3315 Russell Road, No. 222
Las Vegas, NV 80120
(702) 433-2666

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

David T. Goldberg
99 Hudson Street, 8th Floor
New York, NY 10013

September 22, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Matthew Q. Callister
CALLISTER & REYNOLDS
823 South Sixth Street
Las Vegas, NV 89101

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

QUESTIONS PRESENTED

1. Can an individual who is the actual target of a discriminator's racially motivated breach of a contract bring suit under 42 U.S.C. 1981 for the damages he suffers even if he is not a formal party to the contract?

2. Can an individual who is the direct victim of a discriminator's racially motivated impairment of contractual relationships he has with others bring suit under 42 U.S.C. 1981 even if the discriminator is not also a party to those contracts?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 4
ARGUMENT 9
I. Section 1981 Protects the Actual Targets of Contract-Related Discrimination Regardless of Whether They Contract Through Formal Intermediaries. 9
A. The Most Natural Reading of the Plain Language of Section 1981 Protects the Contracting Behavior of Actual Targets of Discrimination Regardless of Whether They Are Formal Signatories. 10
B. Respondent's Ability To Engage in Business and Sell His Labor Free From Racial Discrimination Lies at the Core of Section 1981's Protections. 15
C. Section 1981 Protects the Actual Targets of Contract-Related Discrimination, Including When They Do Business Through Intermediate Persons or Entities. 19
1. This Court's Precedents Recognize That Sections 1981 and 1982 Protect Actual Targets of Discrimination Whose Affairs Involve Intermediaries. 20
2. Section 1981 Protects the Interests of Individuals Doing Business or Providing Their Services Through a Corporate Intermediary 23
3. Excluding Claims By Persons Who Are the Actual Targets of Unlawful Discrimination

Would Create a Serious Gap in the Enforcement of Section 1981. 26

4. Section 1981 Does Not Impose on Entrepreneurs a Hobson's Choice of Either Giving Up the Right to Incorporate or Forsaking Full Relief for Violations of the Right to Be Free from Discrimination. 31

D. Suits by Corporations Are Proper Under Section 1981 Because They Are Necessary for Full Enforcement of the Section 1981 Prohibition Against Racial Discrimination Against Individuals. 33

II. Respondent Also Stated a Claim Under Section 1981 Because Petitioners' Racially Motivated Acts Intentionally Deprived Him of the Benefits of His Contracts With JWM. 35

A. McDonald Had a Contractual Relationship with JWM. 37

B. Section 1981's Protection of Individuals' Contractual Rights Against Outside Impairment Extends Beyond Protecting Them Against Induced Breaches By the Other Contracting Party... 40

1. The History of Section 1981 Reflects Congress's Intention to Reach Impairment of Protected Rights By Outside Parties. 40

2. The 1991 Amendments to Section 1981 Reinforce Its Coverage of Discriminators Who Impair an Individual's Opportunity to Reap the Full Benefits of His Contracts with Other Parties. 45

3. Respondent's Claim Fits Within a Well-Recognized Category of Cases in Which Individuals Have Been Permitted to Sue for Racially Motivated Interference with Their Contractual Relationships. 46

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

Allen v. *Wright*, 468 U.S. 737 (1984) 27
Allgeyer v. *Louisiana*, 165 U.S. 578 (1897) 15
Bains LLC v. *Arco Prods. Co.*, 405 F.3d 764 (CA9 2005) 24, 26
Barrows v. *Jackson*, 346 U.S. 249 (1953) 33, 34, 46
Bediako v. *Stein Mart, Inc.*, 354 F.3d 835 (CA8 2004) 48
Belfast v. *Upsilon Chapter of Pi Kappa Alpha Fraternity at Auburn*, 267 F. Supp. 2d 1139 (M.D. Ala. 2003) 47
Bellows v. *Amoco Oil Co.*, 118 F.3d 268 (CA5 1997) 48
Braswell v. *United States*, 487 U.S. 99 (1988) 13
Cardinal Towing & Auto Repair, Inc. v. *City of Bedford*, 991 F. Supp. 573 (N.D.Tex. 1998) 24
Cargill, Inc. v. *Hedge*, 375 N.W. 2d 477 (Minn. 1985) 32
City of Memphis v. *Greene*, 451 U.S. 100 (1981) 12
Cohen v. *Mirage Resorts, Inc.*, 62 P.3d 720 (Nev. 2003) 38
Coleman v. *Dow Chemical Co.*, 747 F. Supp. 146 (D.Conn. 1990) 47
Coley v. *M&M Mars, Inc.*, 461 F. Supp. 1073 (M.D. Ga. 1978) 48
Collin v. *Rector and Bd. of Visitors of Univ. of Va.*, 873 F. Supp. 1008, (W.D. Va. 1995) 47
Danco, Inc. v. *Wal-Mart Stores, Inc.*, 178 F.3d 8 (CA1 1999) 24, 26
Daniels v. *Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906 (CA7 1991) 47
DeMatteis v. *Eastman Kodak Co.*, 511 F.2d 306 (CA2 1975) 49
Des Vergnes v. *Seekonk Water Dist.*, 601 F.2d 9 (CA1 1979) 24, 47
Faraca v. *Clements*, 506 F.2d 956 (CA5 1975) 47

Gen. Bldg. Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375 (1982) 14, 16, 41
Gersman v. *Group Health Ass'n, Inc.*, 931 F.2d 1565 (CADC 1991) 24
Gomez v. *Alexian Bros. Hosp.*, 698 F.2d 1019 (CA9 1983) 4, 24
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987) ..... passim
Great Am. Tool & Mfg. Co. v. *Adolph Coors Co., Inc.*, 780 F. Supp. 1354 (D. Colo. 1992) 24
Green v. *State Bar of Tex.*, 27 F.3d 1083 (CA5 1994) 48
Guides, Ltd. v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (CA10 2002) 24, 26
Haddle v. *Garrison*, 525 U.S. 121 (1998) 38
Hampton v. *Dillard Dept. Stores, Inc.*, 247 F.3d. 1091 (CA10 2001) 48
Harris v. *Allstate Ins. Co.*, 300 F.3d 1183 (CA10 2002). 24, 47
Hishon v. *King & Spaulding*, 467 U.S. 69 (1984) 37
Hodges v. *United States*, 203 U.S. 1 (1906) 15, 27
Hudson Valley Freedom Theater, Inc. v. *Heimbach*, 671 F.2d 702 (CA2 1982) 33
In Re JWM Investments, Inc., Case No. 00-19303 LBR, U.S. Bankruptcy Court, District of Nevada 3
J.I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 22
Jackson v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005) 11-12
Jett v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) 20, 36
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 10, 11, 19
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) ..... passim
McCrary v. *Runyon*, 515 F. 2d 1082 (CA4 1975) 20
Mian v. *Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085 (CA2 1993) 48
Morrison v. *Am. Bd. of Psychiatry and Neurology, Inc.*, 908 F. Supp. 582 (N.D. Ill. 1996) 47

Park View Heights Corp. v. *City of Black Jack*, 467 F.2d 1208 (CA8 1972) 33
Parks Sch. of Bus., Inc. v. *Symington*, 51 F.3d 1480 (CA9 1995) 33
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 45
Perez v. *Abbott Laboratories*, No. 94 C 4127, 1995 WL 86716 (N.D.Ill. Feb. 27, 1995) 24
Pollard v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) 38
Roepke v. *W. Nat'l Mut. Ins. Co.*, 302 N.W. 2d 350 (Minn. 1981) 32
Rosales v. *AT&T Info. Sys., Inc.*, 702 F. Supp. 1489 (D. Colo. 1988) 24, 31, 33
Runyon v. *McCrary*, 427 U.S. 160 (1976) ..... passim
Saint Francis Coll. v. *Al-Khazraji*, 481 U.S. 604 (1987) 14
Searcy v. *Houston Lighting & Power Co.*, 907 F.2d 562 (CA5 1990) 24
Shaare Tefila Congregation v. *Cobb*, 481 U.S. 615 (1987) 6, 10, 21
Soc. Sec. Bd. v. *Nierotko*, 327 U.S. 358 (1946) 38
Southend Neighborhood Improvement Ass'n v. *St. Clair County*, 743 F.2d 1207 (CA7 1984) 49
Spicer Accounting, Inc. v. *United States*, 918 F.2d 90 (CA9 1990) 37
Spriggs v. *Diamond Auto Glass*, 165 F.3d 1015 (CA4 1999) 47
Stackhouse v. *DeSitter*, 566 F. Supp. 856 (N.D. Ill 1983) 49
Sullivan v. *Little Hunting Park, Inc.* 396 U.S. 229 (1969) ..... passim
Swierkiewicz v. *Sorema N.A.*, 534 U.S. 506 (2002) 37
Thinket Ink Info. Res., Inc. v. *Sun Microsystems, Inc.*, 368 F.3d 1053 (CA9 2004) 24

Tillman v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) ..... passim
U.S. Gypsum Co. v. *Mackey Wall Plaster Co.*, 199 P. 249 (Mont. 1921) 32
United States v. *Price*, 383 U.S. 787 (1966) 12
Veterinary Surgical Consultants, P.C. v. *Comm'r*, 117 T.C. 141 (2001) 37
Vietnamese Fishermen's Ass'n v. *Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) 46
Village of Arlington Heights v. *Metro. Housing Dev. Corp.*, 492 U.S. 252 (1977) 14
Wharf (Holdings) Ltd. v. *United Int'l Holdings, Inc.*, 532 U.S. 588 (2001) 38

Statutes

14 Stat. 27 (1866) 14
42 U.S.C. 1981 ..... passim
42 U.S.C. 1981(b) 13, 36, 45
42 U.S.C. 1981(c) 45
42 U.S.C. 1982 ..... passim

Other Authorities

Walter L. Fleming, Documentary History of Reconstruction (1906) 41
William Meade Fletcher, Fletcher Cyclopedia of the Law of the Law of Private Corporations (perm. ed., rev. vol. 1999) 13, 38, 39
19 Am. Jur. 2d Corporations (2005) 39
Cong. Globe, 39th Cong., 1st Sess. (1866) 16, 42, 43, 44
H.R. Rep. 101-644 (1990) 10, 27, 45
H.R. Rep. 102-40 (1991) 10, 27
Harold M. Hyman & William M. Wiecek, Equal Justice Under Law (1982) 15
Nevada Small Bus. Dev. Ctr., Forms of Business Ownership (2004) 23

Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) 16, 41, 42
Restatement (Second) of Torts § 766 (1979) 43
Rev. Rul. 74-44, 1974-1 C.B. 287 (1974) 37
U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002, Dec. 3, 1997 25

Treatises

HR Series: Policies and Practices (Thomson/West 2005) 25
Tax Planning for Corporations and Shareholders (Matthew Bender & Co. 2005) 23

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent John McDonald is an African American entrepreneur who lives in Nevada. McDonald was the sole officer, director, and stockholder of JWM Investments, Inc., a Nevada corporation he formed in 1996 for the purpose of developing and leasing real property.

1. Because the district court dismissed respondent's complaint for failure to state a claim, see Pet. App. 7, the following allegations from the complaint, *id* 11-14, must be taken as true. In January 1997, petitioner Domino's ~~Pizza~~, Inc. ("Domino's") entered into four agreements with McDonald's corporation, each for the construction of a restaurant in or around Las Vegas that Domino's would subsequently lease and operate. To McDonald's information and belief, he was the only African-American developer used by Domino's to construct restaurants in the southwestern United States.

Petitioners breached several key provisions of the contracts. First, Domino's failed to execute estoppel certificates necessary for JWM to obtain the bank financing it needed to continue performing the contracts. Second, Domino's demanded that respondent either amend or abandon three of the contracts. Third, Domino's failed to pay rent on completed restaurants it had already occupied.

As McDonald sought to perform and enforce the terms of the contracts, he was met with hostility and racial animus. When McDonald telephoned petitioner Pear, the real estate negotiator for Domino's, to reiterate the need for Domino's to satisfy its obligation to provide the estoppel certificates, Pear told McDonald she would see to it that he personally would experience serious financial repercussions and lose his business and financial position if he didn't voluntarily terminate his dealings with Domino's after completing the first of the four restaurants. McDonald then reminded Pear

that he had entered into four contracts with Domino's and informed her that he intended to see them through to completion. Pear responded "I don't like dealing with you people anyway." She also announced that she would personally see to it that Domino's did no further business with McDonald and threatened to use company attorneys to bury him if he initiated a court action to enforce JWM's contracts with Domino's. The conversation concluded with Pear informing McDonald that he "didn't have a chance in hell" of winning. Subsequently, Domino's routed McDonald's calls to Vice President and General Counsel Joe Graziani. Told of petitioner Pear's discriminatory treatment, Graziani refused to conduct any investigation. Graziani agreed to honor Domino's obligations only if McDonald acquiesced in amendments to the contracts favorable to Domino's. Because McDonald insisted on full performance of the existing contracts, Domino's continued to deny the estoppel certificates to which JWM was entitled.

Despite petitioners' refusal to satisfy their contractual promises, McDonald performed his obligations under the contracts. Fulfilling the terms proved to be costly, however, as Domino's made good on Pear's threats to financially ruin him. As a result of being denied the estoppel certificates, McDonald had to forgo numerous construction offers, lost financing for projects not yet started, and was unable to realize potential sales of real property. Because his business depended entirely on his ability to secure land and then develop, sell, or lease it, petitioners' refusal to sign the certificates locked up JWM's resources, thus jeopardizing McDonald's company.

McDonald's financial situation was further damaged when Domino's failed to pay rent on the completed restaurants it already occupied and when its agent, Pear, made derogatory statements about McDonald to Steward Olson, the chief lending officer for Nevada First Bank, who had

formerly agreed to finance construction of two of the restaurants.[1] According to Olson, Pear's statement led him to believe that McDonald was dishonest and untrustworthy. Opposition to Motion to Dismiss at 4. With few resources and fewer prospects, JWM was forced by petitioners' misconduct to file for Chapter 11 bankruptcy (*In Re JWM Investments, Inc.*, Case No. 00-19303 LBR, U.S. Bankruptcy Court, District of Nevada).

As a result of petitioners' misconduct, McDonald's net worth decreased by several million dollars. For example, he lost $500,000 because he had personally pledged certificates of deposit to obtain loans on which JWM later defaulted. Because of the bankruptcy of his wholly owned corporation and personal defamation, his credit is now ruined and he has been unable to finance other business ventures. Affidavit of John McDonald in Support of Opposition to Motion to Dismiss ¶ 5. McDonald has also suffered pain, humiliation, and emotional distress. *Id.*

2. In 2002, McDonald filed suit under 42 U.S.C. 1981 against petitioners Domino's Pizza, LLC; Domino's Pizza, Inc.; and Debbie Pear. The complaint alleged that petitioners' actions constituted intentional racial discrimination against him "that occurred during the term of a contract." Pet. App. 16 (Compl. ¶ 44). Respondent sought injunctive and monetary relief, including "front pay, back pay and other lost benefits," compensatory damages for pain and suffering and emotional distress, punitive damages, costs and attorney's fees. *Id.* 17 (Compl. ¶¶ 2-5).

Petitioners moved to dismiss the complaint on the grounds that McDonald had no right to recover under section 1981 because his company, JWM Investments, Inc., was the

---

[1] The following allegations were made in respondent's Opposition to Defendants' Motion to Dismiss (Document 11 on the district court docket sheet reprinted in the Joint Appendix) [hereinafter "Opposition to Motion to Dismiss"].

formal signatory of the contract with Domino's. The district court agreed, and in an unpublished order, granted the motion to dismiss. *Id.* 3-7.

3. On appeal, the Ninth Circuit unanimously reversed. Pet. App. 1-2. The court of appeals recognized that McDonald could not bring suit for injuries suffered by JWM, but under its longstanding precedent, see *Gomez* v. *Alexian Bros. Hosp.*, 698 F.2d 1019 (CA9 1983), it held that McDonald was entitled to sue under section 1981 for injuries he had suffered as the actual target of petitioners' discrimination that were "distinct from [those] suffered by JWM Investments, Inc." Pet. App. 2. Subsequently, the court of appeals denied Domino's petition for rehearing and petition for rehearing en banc. *Id.* 8.

SUMMARY OF ARGUMENT

1. Section 1981 was enacted to protect individuals' "personal right to engage in economically significant activity free from racially discriminatory interference." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987). In this case, petitioners directly targeted respondent, a black entrepreneur, refusing to fulfill their contractual obligations with his wholly owned corporation because of racial animus against him. Thus, contrary to petitioners' insinuations, the injuries giving rise to this case are not "collateral," Petr. Br. 13, and the rights respondent asserts are not "derivative," *id.* at 20. McDonald is not suing as a "bystander" to racial discrimination, *id.* at 37, nor because he "happens" to have been the owner and operator of JWM. *Id.* at 8.

The core of petitioners' argument is that they need not answer under section 1981 for their intentional racial discrimination against respondent because he chose, like countless other entrepreneurs, to conduct his business in corporate form. Even though McDonald negotiated, signed, performed, and sought to enforce the contract, petitioners insist that it somehow was not his "own," *id.* at 14, and

therefore even as the actual target of their racial animus, he cannot bring suit.

Petitioners' cramped construction of section 1981 finds no support in its text, structure, history, or purposes and it is contradicted by decades of precedent.

First, by its plain terms, section 1981's protections are not confined to the formal signatories to a contract. Section 1981 protects the right of individuals to "make and enforce contracts," without limiting that right to "parties" making and enforcing "their own" contracts. The text also expressly protects the "performance" of a contract, which will frequently be carried out by individuals who are not themselves formal signatories to a contract but whose participation is integral to the contractual relationship.

Second, as this Court has recognized and Congress has emphatically reaffirmed, the focus of section 1981 lies not in assuring that private parties comply with the common law of contracts, but rather in securing equal economic opportunity, by imposing a nonnegotiable duty to refrain from intentional racial discrimination. The remedies available under section 1981 (unlike those in contract law), are defined not by the expectations of the parties, but by the full harm the intentional tortious discrimination has caused – and they include personal, as well as economic, damages. Consistent with the law's treatment of torts (but not breaches of contract) committed by a corporate officer, courts have imposed *individual* liability for violating section 1981.

Third, this Court's precedents firmly establish that persons who are the direct targets of racial discrimination can bring suit without regard to contractual formalities. This Court's first case allowing a section 1981 suit to proceed against a private defendant, *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), reinstated the claims of an African-American family subjected to a private club's racially discriminatory guest policy, even though the relevant contract was not "their own," but rather bound the club and

their white would-be hosts. *Runyon* v. *McCrary*, 427 U.S. 160 (1976), likewise upheld an award of separate damages to a plaintiff – a two-year-old private school applicant – who was the target of the intentionally discriminatory admission policy, although his parents (who were awarded separate damages) were the would-be contracting party. And *Goodman* v. *Lukens Steel*, 482 U.S. 656 (1987), sustained a claim brought by black steelworkers against a union for its intentionally discriminatory refusal to enforce provisions of a contract to which those steelworkers were not parties.

Section 1981 and 42 U.S.C. 1982 started out as adjacent clauses of a single sentence in the Civil Rights Act of 1866. This Court's section 1982 decisions reinforce the conclusion that section 1981 covers cases like respondent's. For example, in *Sullivan* v. *Little Hunting Park, Inc.* 396 U.S. 229 (1969), this Court expressly rejected a privity argument indistinguishable from the one advanced by petitioners here, awarding damages both to the African-American family targeted by the defendant's discrimination *and* to the white individual who was the formal signatory to the contract with the discriminator. And in *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987), this Court permitted recovery by both the corporate owner of a synagogue desecrated for racial reasons and by the individual congregants who suffered their own personal injuries as a result of the vandalism.

Fourth, petitioners' proposed restriction of section 1981 poses an unacceptable danger to the core interests protected by that statute. Petitioners' construction would limit a discriminator's liability for the same harm caused by the same actions with the same intent because of the fortuity that the contract was signed by a corporation rather than by a sole proprietor. For a variety of pragmatic reasons, corporations may decline to sue even when their workers are the actual targets of intentional discrimination by parties with whom the corporation has contracted. Remarkably, Domino's argues that individual victims of discrimination should not be

permitted to sue because that would interfere with the discretion of a corporation to placate wrongdoers by ignoring their illegal actions. To the contrary, the danger that corporations will do this is precisely why individuals *should* be able to sue.

Nor should this Court be swayed by the ill-considered suggestion that the statute's protections should be denied to those who "decide to do business" through the corporate form. Although state and federal law attach certain benefits and burdens to incorporation, forfeiture of the personal protections of section 1981 has never been one of them. Were that the law, minority businesspeople unwilling to forfeit those protections would be forced to compete on a permanently unequal basis – literally the antithesis of the level playing field that Congress intended section 1981 to foster. Nor is there the least merit in the idea that holding Domino's liable for intentional discrimination would enable McDonald to "have it both ways": in reality, it is Domino's that is selective in its respect for the corporate form, lifting the veil of the legally "nonracial" JWM to discriminate against its owner-operator, but then seeking to invoke that very corporate formality to cut off liability for harm this intentional discrimination caused.

Giving effect to Congress' plain intention to protect individuals in McDonald's position carries no plausible danger of the open-ended liability that petitioners and their *amici* brandish. These slippery slope arguments have a common defect: willful blindness to the principle that distinguishes McDonald's case from the hypotheticals they pose. The plaintiff in this case was the actual, intended target of petitioners' discriminatory conduct. Recognizing his right to sue under section 1981 leaves no opening for suits based on injury as a result of racial discrimination directed against someone else.

2. It is settled law that the 1866 Civil Rights Act's prohibitions are not limited to *defendants* who were

contracting parties. Given the Reconstruction Congress's predominant concern with the Black Codes and other efforts, public and private, to forbid black people from entering into voluntary transactions with willing partners, petitioners cannot seriously dispute that the rights guaranteed by section 1981 are protected "against the actions of third parties," *Sullivan*, 396 U.S. at 237, as well as against those of formal signatories. Because the complaint's allegations establish that petitioners' racially discriminatory acts intentionally denied McDonald the rights and benefits of "the contractual relationship" he had with JWM, he has stated a claim under section 1981 against petitioners.

Rather than contend that third-party actions may never be the basis for section 1981 liability, petitioners contend, first, that respondent's complaint fails to allege that he had any contractual relationship with JWM and, second, that liability for section 1981 claims against discriminators who impair a plaintiff's contractual rights should be defined by and limited to the common-law tort of third party interference with contractual relations. Thus, after conceding that section 1981 provides a cause of action for an individual whose employer was persuaded by a defendant "to fire the employee, or to staff the employee on a different project, because of his race," Petr. Br. 33, they paradoxically suggest that section 1981 somehow does not reach discriminatory actions aimed at the contractual relationship for similarly racial reasons but directed at the minority employee.

Contrary to petitioners' assertions, the complaint includes numerous allegations that may – and at this stage of the proceedings, must – be read to assert a contractual relationship between JWM and McDonald. The complaint plainly describes an employment relationship between JWM and McDonald. Moreover, as the "owner" of the corporation, McDonald was necessarily party to a second contract with JWM, in his capacity as shareholder. To be sure, this latter contractual relationship does not entitle him to sue for injuries

to the corporation. But the injuries alleged in this complaint are not corporate. Rather they involve personal injuries to McDonald caused by discriminatory acts directed at him as a black small-business owner.

Nor is there any basis for concluding that Congress intended to limit section 1981 liability for impairment of a plaintiff's contractual relations to racially motivated instances of common-law tortious interference. The text of the statute contains not a hint of that limitation. To the contrary, an individual's ability to "perform" an employment contract is impaired when he is intimidated into abandoning it, and history shows the Reconstruction Congress to have been especially concerned about that sort of behavior.

ARGUMENT

I. Section 1981 Protects the Actual Targets of Contract-Related Discrimination Regardless of Whether They Contract Through Formal Intermediaries.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts." 42 U.S.C. 1981. In construing section 1981 and the parallel provision of 42 U.S.C. 1982,[2] which originated in the same

---

[2] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Given that "[t]he operative language of both § 1981 and § 1982 is traceable" to the same sentence of the 1866 Civil Rights Act, this Court has consistently construed the statutes to reach the same types of defendants (the only difference being that section 1982 covers transactions involving real and personal property while section 1981 covers contracts more generally). *Runyon* v.

sentence of the Civil Rights Act of 1866, this Court has extended its protections to cover intentional racial discrimination to two classes of individuals. First, sections 1981 and 1982 protect targets of discrimination when they are actual or would-be contract signatories or property owners. See, *e.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Tillman* v. *Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Second, sections 1981 and 1982 protect the actual targets of discrimination when they are conducting their activities through an actual or would-be signatory or owner. See *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987); *Runyon* v. *McCrary*, 427 U.S. 160 (1976). As a black entrepreneur conducting his business through a wholly-owned corporation, respondent falls squarely within this well-recognized second category.

A. The Most Natural Reading of the Plain Language of Section 1981 Protects the Contracting Behavior of Actual Targets of Discrimination Regardless of Whether They Are Formal Signatories.

This case turns on the unsurprising premise that section 1981, enacted to "bar *all* race discrimination in contractual relations," H.R. Rep. 102-40, pt. 1, at 92 (1991) (emphasis added),[3] was intended to protect the actual targets of that discrimination. The unlawfulness of the discrimination alleged in this case is not in dispute.[4] There is no question, for

---

McCrary, 427 U.S. 160, 171 (1976) (quoting *Tillman* v. *Wheaton-Haven Recreational Ass'n*, 410 U.S. 431, 439 (1973)).

[3] See also H.R. Rep. 101-644, pt. 2, at 43 (1990) ("The Committee intends this provision to bar *all* racial discrimination in contracts.") (emphasis added).

[4] While there was originally some uncertainty as to petitioners' precise position, compare Defendants' 12(b)(6) Motion to Dismiss for Failure to State A Claim Upon Which Relief Can Be Granted at 6-7 (claiming only JWM could sue) with Reply to Plaintiff's Opposition

example, that petitioners would be liable to McDonald if he had operated his business as a sole proprietorship. See *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The question in this case is whether McDonald lost the protection of section 1981 when he organized his business as a corporation instead. Nothing in the text of section 1981 supports petitioners' contention that actual targets of discrimination are somehow stripped of protection when they do business through a corporation. To the contrary, when a minority entrepreneur like McDonald does business through a corporation, the terms of section 1981 protect both the actions taken by that entrepreneur and the benefits that he or she receives from the transaction.

Petitioners insist that the reference in section 1981 to the right to "make and enforce contracts" grants to potential plaintiffs only "the right to be free from racial discrimination in *their own* actual or prospective contractual relationships." Petr. Br. 14 (emphasis added); see also *id.* at 25 (McDonald sustained no injury "to any actual or potential contractual relationship of *his own*") (emphasis added). But the words "their own" (or "his own") simply are not to be found in the language of section 1981.[5] The failure of Congress to include

---

to Defendants' 12(b)(6) Motion to Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted at 6. (claiming no one could sue), eventually petitioners agreed that JWM would have a section 1981 claim, Supplemental Reply to Opposi[ti]on to Motion to Dismiss at 3. In the court of appeals, petitioners argued only that an action by McDonald was improper because it was based on a violation of the rights of a third party, JWM. Defendants-Appellees' Answering Brief at 6, 9-13, *McDonald* v. *Domino's Pizza, LLC*, (CA9 2004) (No. 02-16900).

[5] *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005), rejected a similar attempt to read into Title IX of the Education Amendments of 1972 a limitation not to be found in the text of that statute:

such a limitation cannot be dismissed as "a mere slip of the legislative pen." *Jones*, 392 U.S. at 427. Here, as with section 1982 in *Jones*, section 1981 should be "accord[ed] a sweep as broad as its language." *Id.* at 437 (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)).[6]

Section 1981 provides that all persons have a right to be free from discrimination "to make and enforce contracts," not merely to make and enforce *their own* contracts. For example, one person can make a contract as an agent for someone else. Where the party to a contract is a corporation, a natural person of necessity must actually negotiate, approve, and execute the contract. Congress did not provide more narrowly only that all persons have a right to be "parties" to a contract, an omission all the more telling because the very term "parties" is used elsewhere in section 1981 itself (protecting the right of all persons to "be parties" to a lawsuit). If Domino's refused to deal with the salesman for a pepperoni manufacturer because the salesman was black, that would violate the section 1981 right of the salesman to make a contract on behalf of his principal. By contrast, JWM's accountant would not have a claim under section 1981, even though that accountant

---

> [Title IX] is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If the statute provided instead that "no person shall be subjected to discrimination on the basis of *such individual's* sex," then we would agree with the Board. However, Title IX contains no such limitation.

125 S. Ct. at 1507 (internal citation omitted) (emphasis in original).

[6] This Court has emphasized the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866," from which 42 U.S.C. 1981 and 1982 derive. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). Section 1981, like section 1982, is to be "broadly construed." *City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981).

undoubtedly lost some business when, as a result of petitioners' discriminatory actions, JWM went bankrupt. But that is because, unlike Mr. McDonald, the accountant was not the target of Domino's racial discrimination.

The text of section 1981 has always protected the right to "enforce" a contract through legal action. It was precisely because McDonald was an African American who threatened to take legal action – that is, to "enforce" the contract he had made with Domino's as president of JWM – that he was threatened and verbally abused by petitioners' employees. Pet. App. 13 (Compl. ¶ 19) (alleging that petitioner Pear "threatened to use the company's attorney to bury Plaintiff in the event a court action was initiated").

As amended in 1991, the text of section 1981 also expressly protects the "performance" of a contract. 42 U.S.C. 1981(b). Performance of a corporation's contracts will frequently be carried out by the individuals who are its owners or employees, as occurred in this case. Cf. *Braswell* v. *United States*, 487 U.S. 99, 110 (1988) (noting that "[a]rtificial entities such as corporations" may act only through natural persons); 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of the Law of Private Corporations § 30 (perm. ed., rev. vol. 1999).

Finally, the text of section 1981 protects "the enjoyment of all benefits, privileges, terms, and conditions of *the* contractual relationship." 42 U.S.C. 1981(b) (emphasis added). Again, the plain language of the statute is not limited to enjoyment of the benefits of the plaintiff's *own* contractual relationships.

In sum, the very activities that an entrepreneur personally undertakes when doing business through his corporation – negotiating and executing contracts, performing contracts, taking steps to enforce contracts – as well as the benefits the entrepreneur receives as wages or from the status of owning a corporation are precisely the activities and benefits protected by the literal language of section 1981.

Petitioners' suggestion that the sole, or even the primary, purpose of section 1981 in a case such as this was to protect the

interest of the corporation is inconsistent with the plain language of section 1981. The manifest intent of section 1981 was to protect against intentional *racial* discrimination. *Gen. Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 383-391 (1982). But a corporation does not have a race. "As a corporation, [JWM] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Village of Arlington Heights* v. *Metro. Housing Dev. Corp.*, 492 U.S. 252, 263 (1977). There are of course cases in which a defendant imputes to a corporation the race of the actual target of its discrimination. Under those circumstances, the corporation also has a cognizable claim under section 1981 in not being a victim of race-based discrimination. See *infra* Part I.D. But clearly the corporation's interest does not supplant the core interest of the individual human being who is the actual target of the defendant's racial animus. Section 1981 was "intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination solely because of *their ancestry or ethnic characteristics*." *Saint Francis Coll.* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987) (emphasis added).

That the interests of a corporation could not be the sole or primary interests protected by section 1981 is reinforced by the original language of section 1 of the 1866 Civil Rights Act.

> [A]ll persons born in the United States and not subject to any foreign power * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, * * * shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * * .

14 Stat. 27 (1866). In the form in which they were first enacted, the rights now contained in section 1981 were accorded *only* to individuals who were United States citizens by virtue of having been born in this country, a group that obviously could not include corporations. As of 1866, it was emphatically the interests of private individuals that section 1981 was intended to

protect. That section 1981's protections subsequently expanded to cover entities other than natural persons hardly undermines their coverage of human beings.

B. Respondent's Ability To Engage in Business and Sell His Labor Free From Racial Discrimination Lies at the Core of Section 1981's Protections.

The provisions of section 1981 regarding discrimination in contracting were enacted to "guarante[e] the personal right to engage in economically significant activity free from racially discriminatory interference." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987). As the first Justice Harlan explained:

> [T]he freedom established by the 13th Amendment * * * "is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Hodges v. *United States*, 203 U.S. 1, 35-36 (1906) (Harlan, J., dissenting) (quoting *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897) (emphasis omitted). Justice Harlan's view ultimately prevailed when this Court overruled *Hodges* in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443 n.78 (1968).

The 1866 Civil Rights Act was adopted in large part to nullify the Black Codes, which severely limited economic rights of the newly freed slaves. See Harold M. Hyman & William M. Wiecek, Equal Justice Under Law 319-20 (1982). The Act's supporters believed that freedom would be valueless if the newly freed slaves could not engage in economic transactions. Section 1981 prohibited discrimination related to contracts, not to federalize the common law of contracts, but as a method of providing to the newly freed slaves "the means of holding and enjoying the proceeds of their toil." Cong. Globe,

39th Cong., 1st Sess. 1159 (1866) (statement of Rep. Windom).[7]

Congress adopted the 1866 Civil Rights Act as a comprehensive charter designed to protect the hard-won liberty of the freedmen and to ensure that they could rely on their skills and initiative to advance their economic interests. The protections enumerated in section 1 of the Act encompassed every right that the framers knew or could foresee that the former slaves might require in order to participate fully in economic life. Congress stopped short of an unrestricted prohibition against *all* forms of discrimination only because of a concern that it might be construed to extend to political rights. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388 n.15 (1982). The rights enacted in section 1 should be given full effect and construed to reach new devices and schemes intended to deny individuals on the basis of race the ability to hold and enjoy the proceeds of their toil.

---

[7] One of the key pieces of evidence on which Congress relied in enacting section 1981 was a comprehensive report by Major General Carl Schurz on conditions in the South. See Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) [hereinafter "Schurz Report"]; see also *Jones*, 392 U.S. at 428 (describing the Schurz Report).

The Schurz Report recounted that the newly freed slave "is positively prohibited from working or carrying on a business for himself." Schurz Report, *supra*, at 24. Senator Eliot warned that without the protections of the 1866 Civil Rights Act, a freedman would be "without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable." Cong. Globe, 39th Cong., 1st Sess. 514 (1866). Senator Trumbull pointed to a newly enacted Mississippi law whose purpose was "to prevent any freedmen from doing any independent business." *Id.* at 1759. Representative Lawrence explained that the enactment of section 1 was required to enable the freed slaves "to secure the privilege and rewards of labor." *Id.* at 1832-33.

The zone of interests protected by a statute such as section 1981 directed at racial discrimination is manifestly different from the zone of interests protected by traditional contract law. The basic purpose of the common law of contracts, and of statutes such as the Uniform Commercial Code providing for the enforcement of contracts, is to protect the interests of contracting parties, and of certain intended third-party beneficiaries. Thus, if a state-law contract action were brought against Domino's, the zone of interests protected by Nevada contract law presumably would be limited to JWM, as a contracting party, and to any intended third-party beneficiaries. But the purpose of section 1981 is to protect against racial discrimination.[8] The overarching purpose of Reconstruction, after all, was not to deal with a sudden rash of contract violations, but to secure the freedom of the former slaves, and to assure that they could participate in the economic life of the nation unencumbered by racial discrimination.

Thus, the interests asserted by McDonald – to conduct business and to be compensated for his labor unimpeded by racial discrimination – lie at the very heart of the concerns that section 1981 was fashioned to address. For his entrepreneurial efforts in acquiring land and constructing and leasing restaurants, Domino's was to pay a substantial sum in rent to JWM, most or all of which, after expenses, would go to McDonald in recompense for his time, effort, and skills.

The complaint alleges that certain Domino's officials took a series of discriminatory actions because of their racial animus toward McDonald. Domino's had no racially motivated ill will toward JWM as such; Domino's would not have taken the actions complained of if McDonald had been white. The

---

[8] This distinction plays out in the calculation of damages. The damages in contracts cases are intended to give the injured party the economic benefits of his bargain, measured through reliance, restitution, or expectation. By contrast, section 1981 claims sound in tort, see, *e.g.*, *Goodman*, 482 U.S. at 661-62, and can include non-economic damages as well.

discriminatory acts were directed at McDonald in a highly personal manner: a Domino's official threatened McDonald with personal financial ruin, Pet. App. 12 (Compl. ¶ 19), and, referring to McDonald's race, admonished him "I don't like dealing with you people anyway." *Id.* 13. The complaint asserts that as a result of the discrimination of which he was the actual target,[9] McDonald suffered injuries distinct from any damages that occurred to JWM,[10] the corporation through which he was doing business. JWM too was injured, but those harms were incidental to the discrimination aimed at

---

[9] Petitioners correctly observe that the "circumstances of this case allow McDonald to claim that he was the *direct target* of the alleged discrimination." Petr. Br. 37 (emphasis added).

[10] The complaint identifies several such monetary claims:

1. The complaint alleges that McDonald personally suffered "damages for pain and suffering, emotional distress and humiliation," Pet. App. 16 (Compl. ¶ 46), and sought compensatory damages for those injuries, *id.* at 17.

2. The complaint sought back pay and front pay, which McDonald assertedly would have received if Domino's had not violated section 1981. *Id.* 17 (Compl. ¶ 2). This is not money which JWM itself could have recovered. JWM could only have recovered an amount equal to the profit it would have obtained from the contracts (and perhaps certain consequential damages). The amount of wages that JWM would have paid to McDonald could not have been recovered by JWM; to the contrary, those wages would have been subtracted from the contracted-for amounts in determining what profits JWM would have made.

3. The complaint alleges that McDonald was forced by the defendant's actions "to sit on the land *he* already possessed and not develop, sell or lease them [sic]." *Id.* 14 (Compl. ¶ 26) (emphasis added). Redress for that injury was within the scope of the damages "for pecuniary losses" sought in the complaint. *Id.* 17 (Compl. ¶ 3).

4. The complaint asserts that "Plaintiff had numerous construction offers which he was unable to secure" because of petitioners' discriminatory conduct. *Id.* 13 (Compl. ¶ 24).

McDonald; Domino's only took action harmful to JWM because it was owned and operated by an African-American.

C. Section 1981 Protects the Actual Targets of Contract-Related Discrimination, Including When They Do Business Through Intermediate Persons or Entities.

Had the intentional discrimination in this case been taken against McDonald as a sole proprietor, he undoubtedly could have invoked section 1981. That case would be directly controlled by this Court's decisions in *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). But here, as in most substantial business agreements, the underlying contract was between two corporations:[11] JWM, of which McDonald was the owner-operator, and Domino's. JWM was, in petitioners' apt phrase, merely a "corporate intermediary" between McDonald and Domino's. Petr. Br. 27. "McDonald himself chose to do business *through* JWM." *Id.* at 26 (emphasis omitted and added). Whatever the contractual formalities, Domino's understood that it was "do[ing] business" with McDonald. The deal fell apart precisely because certain Domino's officials objected to dealing with an African-American.

The fact that JWM rather than McDonald was formally the party to the contract neither places the intentional discrimination by Domino's outside the prohibitions of section 1981 nor puts McDonald's "right to engage in economically significant activity" outside the zone of interests that section 1981 protects. *Goodman*, 482 U.S. at 662. Section 1981

---

[11] More recently, entrepreneurs and now professionals, including lawyers, doctors, and accountants, do business as limited liability companies or professional corporations. The discussion in this brief of the use and purposes of corporations is, in general, equally applicable to LLC's and PC's.

provides redress both for McDonald, the actual target of the discrimination, and for JWM, an intermediate victim of the discriminatory acts.[12]

1. This Court's Precedents Recognize That Sections 1981 and 1982 Protect Actual Targets of Discrimination Whose Affairs Involve Intermediaries.

Contrary to petitioners' contentions, this Court has consistently applied sections 1981 and 1982 in cases where the actual targets of discrimination were not themselves either formal signatories or would-be signatories to a contract or formal owners of the property at issue. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that Bobbe's School had violated section 1981 when it refused to admit Michael McCrary because he was African-American. Michael McCrary himself, however, had never sought to contract with the school, and could not legally have done so; at the time of the alleged discrimination, Michael was only two years old. See *McCrary* v. *Runyon*, 515 F. 2d 1082, 1085 (CA4 1975). The individuals who actually sought to contract with Bobbe's School were his parents. The school's discriminatory policies were directed at prospective students, not their parents; the school clearly would have refused to admit Michael McCrary even if he had been the adopted child of white parents. The Court's decision in *Runyon v. McCrary* does not even refer to the race of Mr. and Mrs. McCrary. Michael McCrary was the

---

[12] This Court has already recognized the existence of an implied cause of action to enforce section 1981 against private parties. *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). There is also an express cause of action under 42 U.S.C. 1983 for section 1981 claims against governmental defendants.

Whether there is a private cause of action to enforce section 1981 is analytically distinct from the issue of which plaintiffs have claims which fall within the zone of interests protected by section 1981.

actual target of the discrimination; his parents were only the intermediate victims.[13] This Court nonetheless had no doubt that section 1981 allowed Michael McCrary to sue, and properly so.

A similar three-party situation was present in *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987). The defendant had sprayed swastikas and anti-Semitic slogans on the outside of a synagogue owned by the Congregation Shaare Tefila, under Maryland law a non-stock membership religious corporation.[14] Both the Congregation and several of its members sued, alleging that the vandalism violated the right protected by section 1982 to hold property free of racial discrimination.[15] But the defaced synagogue was owned, not by the congregation members whose ancestry was the target of the prohibited discrimination, but by the distinct legal entity, Congregation Shaare Tefila itself. Yet here too, this Court did not question the members' ability to sue.

In either of these cases it might have been possible for those involved to so structure their affairs that the actual targets of the discrimination would have been the contracting party in *Runyon* and the property owner in *Shaare Tefila*. Mr. and Mrs. McCrary could have placed the needed tuition funds in a Uniform Gift to Minors account, and then, as Michael McCrary's legal guardians, entered into a contract on his behalf with the school. It might have been possible to organize the

---

[13] At trial, the court awarded Michael damages of $1000, and his parents damages of $2000. See 427 U.S. at 166 n.4.

[14] App. to Pet. for Writ of Cert. at App. D, *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987) (No. 85-2156).

[15] Section 1982 applied to discrimination against Jews because at the time the statute was adopted "race" meant ancestry or ethnic group. *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. at 617-18. Cobb may have acted in part out of animus toward the religious purpose of the Congregation, but *that* animus would not have been actionable under section 1982.

Congregation in *Shaare Tefila* differently, with title to the synagogue building instead being held jointly by all the individual members of the congregation. But the framers of the 1866 Act manifestly did not intend that such an awkward arrangement would be required in order to invoke the protections of sections 1981 and 1982. It is equally unlikely that Congress in adopting section 1981 intended to require the actual targets of discrimination, as a condition of receiving redress for their personal injuries, to give up the right to do business as a corporation.

Petitioners' contention that section 1981 protects from discrimination only the interests of plaintiffs in contractual privity with the defendant is inconsistent with this Court's decision in *Goodman*. The plaintiffs there, black employees who were members of the United Steelworkers, proved that their union had deliberately refused to pursue grievances that asserted that Lukens Steel had violated its collective bargaining agreement by engaging in racial discrimination. But the collective bargaining agreement that the union had unlawfully declined to enforce was a contract between the United Steelworkers and Lukens Steel Company; the aggrieved black employees were not parties to that agreement. Cf. *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 335-36 (1944) (noting that collective bargaining agreements are not contracts of employment, and that an employee has status under the agreement "somewhat as a third party beneficiary"). If only parties to a particular contract were within the zone of interests protected by section 1981, the plaintiffs in *Goodman* would have had no viable claim. And yet, this Court affirmed the finding of liability against the union. See 482 U.S. at 664-69. *Goodman* was established law when Congress, four years later, adopted the 1991 Civil Rights Act.

2. Section 1981 Protects the Interests of Individuals Doing Business or Providing Their Services Through a Corporate Intermediary.

Racial discrimination because of the race of the owner or employees of a corporation easily falls within the scope of section 1981. In modern business transactions, corporations often play an essential intermediate role, as did the parents in *Runyon* and the Congregation in *Shaare Tefila*. Where racial discrimination related to contracts occurs because of the race of a corporation's owner-operator, the owner-operator (like the black applicants in *Runyon* and the Jewish congregation members in *Shaare Tefila*) is the actual target of that unlawful discrimination, while the corporation itself is an intermediate victim.

In the modern world, a number of practical, economic, legal, and tax considerations may compel individuals to conduct their affairs through corporations or other intermediate parties.[16] First, incorporation ordinarily protects a corporation's owners from personal liability for the debts of the firm. Second, an entrepreneur can form several corporations to carry on separate businesses, permitting him or her to establish different equity and financial structures and to work with different co-owners. Third, there can be important federal income tax advantages to doing business as a corporation; for certain taxpayers, doing business as a sole proprietorship could cost thousands of dollars in increased taxes. See Tax Planning for Corporations and Shareholders § 1.01 (Matthew Bender & Co. 2005). Fourth, in some instances the lenders or others with whom an entrepreneur does business may insist on incorporation. See *id.* § 1.02 [1][a][ii].

---

[16] Thus, for example, the Small Business Development Center in Nevada – where McDonald lives – urges entrepreneurs to incorporate. Nevada Small Bus. Dev. Ctr., Forms of Business Ownership 6 (2004), *available at* http://www.nsbdc.org/resources/documents/images/FormsofOwnership.pdf (last visited Sept. 20, 2005).

This intractable reality of modern business life is reflected in section 1981 litigation. A significant number of the reported section 1981 decisions (other than those based on employment claims) involve minority-owned corporations. The importance and prevalence of incorporation is reflected in the wide range of business activities of these section 1981 claimants: parking lot maintenance,[17] towing,[18] office supplies,[19] technology services,[20] repair services,[21] medical services,[22] software services,[23] information services,[24] tool manufacturing,[25] retailing of African art and artifacts,[26] the sale and transportation of natural gas[27] and gasoline,[28] and real estate development.[29]

---

[17] *Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8 (CA1 1999), cert. denied, 528 U.S. 1105 (2000).

[18] *Cardinal Towing & Auto Repair, Inc.* v. *City of Bedford*, 991 F. Supp. 573 (N.D.Tex. 1998).

[19] *Perez* v. *Abbott Laboratories*, No. 94 C 4127, 1995 WL 86716 (N.D.Ill. Feb. 27, 1995).

[20] *Thinket Ink Info. Res., Inc.* v. *Sun Microsystems, Inc.*, 368 F.3d 1053 (CA9 2004).

[21] *Harris* v. *Allstate Ins. Co.*, 300 F.3d 1183 (CA10 2002).

[22] *Gomez* v. *Alexian Bros. Hosp.*, 698 F.2d 1019 (CA9 1983).

[23] *Gersman* v. *Group Health Ass'n, Inc.*, 931 F.2d 1565 (CADC 1991), vacated, 502 U.S. 1068 (1992).

[24] *Rosales* v. *AT&T Info. Sys., Inc.*, 702 F. Supp. 1489 (D. Colo. 1988).

[25] *Great Am. Tool & Mfg. Co.* v. *Adolph Coors Co., Inc.*, 780 F. Supp. 1354 (D. Colo. 1992).

[26] *Guides, Ltd.* v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (CA10 2002).

[27] *Searcy* v. *Houston Lighting & Power Co.*, 907 F.2d 562 (CA5 1990), cert. denied, 498 U.S. 970 (1990).

[28] *Bains LLC* v. *Arco Prods. Co.*, 405 F.3d 764 (CA9 2005).

[29] *Des Vergnes* v. *Seekonk Water Dist.*, 601 F.2d 9 (CA1 1979).

Application of section 1981 to a refusal to deal with a corporation (or other entity) because of the race of its employees is of equal importance. Today, millions of individuals who provide labor and services to a business or individual are technically the employees of some other entity. In the construction industry, many of the individuals working at a particular job site are actually employees of specialized subcontractors, rather than of the landowner or general contractor. An entire industry has grown up of firms, such as Kelly Services, Manpower, and Accountemps, that provide temporary employment services. The workers serve on the premises of the business in question and under its supervision; those workers, however, are actually employees of the temporary agency, through which the business whose work they perform pays them.[30] In addition, a large number of individuals with technical skills do their work at one business (*e.g.*, a law firm) while on the payroll of another firm (*e.g.*, a copier service company). If in these cases the entity receiving and ultimately paying for the services could lawfully discriminate against those workers, or refuse to do business with an employer because of the race of its employees, millions of American workers would fall outside the protections of section 1981.

---

[30] See U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002, Dec. 3, 1997, *available at* http://www.eeoc.gov/policy/docs/conting.html (last visited Sept. 20, 2005) (explaining that "a temporary employment agency employs the individuals that it places in temporary jobs at its clients' work sites" and then "bills the client for the services performed," and that "both staffing firms and their clients share EEO responsibilities toward [temporary] workers"); see also HR Series: Policies and Practices § 29:1 (Thomson/West 2005) ("What distinguishes [contingent worker] arrangements from the traditional employer-employee relationship is that the business is contracting with another entity * * * rather than hiring an employee.").

3. Excluding Claims By Persons Who Are the Actual Targets of Unlawful Discrimination Would Create a Serious Gap in the Enforcement of Section 1981.

If section 1981 (or section 1982) did not apply to such three-way relationships, or if the actual targets of discrimination could not obtain redress in such situations, the effectiveness of sections 1981 and 1982 would be seriously impaired, and would-be discriminators would at times be able to evade the statutory prohibition against discrimination.

If section 1981 did not permit recovery of the damages sustained by the actual target of discrimination whenever a corporation or other intermediary was involved, significant injuries caused by violations of section 1981 would go unredressed. See, *e.g.*, *Guides, Ltd.* v. *Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1071 (CA10 2002) (jury found that the proven violation of section 1981 had caused $150,000 in damages to the corporation and $200,000 in damages to its owner-operator). In many instances, the wrongdoer would escape liability altogether.

There are a number of types of discriminatory practices that (at least ordinarily) will injure only the actual target of the discrimination, but not the intermediate person or entity. For example, racial harassment of the owner or an employee of a corporation will not injure the corporation itself unless it somehow causes lost profits. See *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 767-68, 770-71 (CA9 2005) (only corporation itself permitted to sue despite protracted personal harassment of its Sikh owner-operators); *Danco, Inc.* v. *Wal-Mart Stores, Inc.*, 178 F.3d 8, 10-11, 15-16 (CA1 1999) (noting, in case involving racial harassment of Mexican-American owner-operator, "it seems unlikely that [the corporation] itself could have established monetary damages of any size from the racial incidents").

In the instant case, McDonald asserts that Domino's officials engaged in a number of actions that injured McDonald

personally, but could not have harmed JWM, including threats, verbal abuse, and interference with McDonald's personal business activities. On petitioners' view, none of these injuries, however intentional or foreseeable, would be actionable under section 1981. Under the theory advanced by petitioners, moreover, Domino's would have faced no liability under section 1981 to anyone if Domino's officials had beaten up McDonald in an attempt to intimidate him into canceling JWM's contract, but he had the fortitude to persevere as a small businessman. JWM would have had no claim because it would still have received all the benefits promised by the contract, and under petitioners' theory, McDonald would have had no claim because he wasn't the formal signatory, even though he controlled the signatory completely. Cf. *Hodges* v. *United States*, 203 U.S. 1, 3 (1906) (white armed mob forcibly drove African-American workers from the lumber mill where they worked thereby inducing them to relinquish their contractual entitlements).

Under Domino's interpretation of section 1981, moreover, certain types of injuries would be excluded per se from redress under section 1981 whenever an intermediate corporation is involved. The complaint in the instant case sought damages for the pain and suffering, mental anguish, and humiliation suffered by McDonald. "[T]his sort of noneconomic injury is one of the most serious consequences of discriminatory * * * action." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984).[31] But it is an injury

---

[31] See H.R. Rep. 102-40, pt.1, at 92 (1991) ("In a wide range of cases, only an award of monetary damages makes a victim whole for *physical, emotional* or economic injury resulting from interntional [sic] race discrimination.") (emphasis added); H.R. Rep. 101-644, pt. 1, at 87-88 (1990) (citing the case of a plaintiff who, prior to the 1991 amendments to section 1981, "received nothing for the humiliation, loss of dignity, and psychological and physical harm a federal jury found she had suffered as a result of her employer's intentional discrimination and harassment").

for which only individuals can seek redress; corporations (however beneficent or vindictive their policies) do not themselves have feelings.[32] The complaint also sought backpay, relief which could be obtained only to the extent to which JWM had *not* paid McDonald for the work in question. Wages that were never paid to JWM employees because of Domino's discriminatory conduct represent to JWM, not an injury, but a business expense that was avoided. In an action of its own under section 1981, JWM itself could not collect money owed to it by Domino's that would have been used to pay the salaries of McDonald or other JWM employees for work they would have performed had the breach not occurred. Its damages would include only those wages it actually paid or was still obligated to pay. JWM could sue only for lost profits or other injuries to the corporation, not for economic injuries to its employees. To the extent that the contract payments from Domino's would have been used to pay an employee who never became entitled to wages at all, JWM suffered no injury for which it was entitled to compensation.

Where owners or employees are the actual targets of discrimination and as a result suffer distinct personal injuries, permitting them to obtain redress for those injuries will not impose excessive liability on the wrongdoer. Those individual plaintiffs may only obtain damages for personal injuries that are separate from the harms suffered by a related corporation; the lower courts are competent to ensure that no double recovery occurs. The total amount of damages will be no greater than would have been awarded if the discrimination had been inflicted on a sole proprietorship; the only difference will be

---

[32] Similarly, in *Shaare Tefila*, the emotional harm caused to congregation members when the defendants painted "DEATH TO THE JUDE," "TAKE A SHOWER JEW," "DEAD JEW," and a swastika on the walls of the synagogue was undoubtedly far more serious than the financial cost to the Congregation of physically removing that graffiti. See Brief for Petitioner at 3-5, *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987) (No. 85-2156).

that that amount will be divided appropriately among the several victims.

The suggestion by several states that this interpretation of section 1981 would impose unreasonable burdens on state and local officials, see Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioners at 1-2, is simply baffling. The Fourteenth Amendment *already* applies to any racial discrimination by state and local officials or governments against an individual, regardless of whether the victim is an actual or would-be contracting party. Any party that would have a colorable cause of action against a public entity under section 1981 would necessarily also have a Fourteenth Amendment claim under section 1983, which has no contractual requirement and applies to those acting under color of law. Interpreting section 1981 in the manner suggested by petitioners would not add to the types of claims actionable against government officials or governments. In any event, the longstanding availability of equal protection claims against government officials has led to none of the dire consequences predicted by petitioners or their *amici*.

The gaps in the redress available under section 1981 that petitioners' interpretation would create would permit a discriminator to reduce or even to avoid legal liability under section 1981 by engaging in discriminatory practices targeted at the owner-operator or employees of a firm, rather than at the firm itself. In the instant case, although Domino's could have faced liability if it had injured JWM's relationship with its bank, under petitioners' theory it faces no liability for interfering with McDonald's relationship with his personal bank. If Domino's were disposed to use violence to pressure JWM to give up its contract rights, it could avoid section 1981 liability for such tactics by burning (or threatening to burn) McDonald's home, rather than JWM's corporate offices.

Domino's urges that the employees and owners of a corporation should not be permitted to sue for their own injuries because the corporation that was also harmed may prefer, in

order to avoid antagonizing the wrongdoer, not to complain about unlawful racial discrimination. Petr. Br. 38. Although that issue would not arise with regard to the minority owner-operator of a small firm, the situation Domino's describes could well occur in the case of discrimination against a minority employee of a white-owned firm. A temporary employment agency, for example, might decide to ignore the race-based rejection of a black temporary worker, rather than risk alienating an important customer. A bar to actions by the actual targets of that discrimination would mean the minority employees victimized by such discrimination could not even sue for injunctive relief.

The very real possibility that Domino's describes, however, is precisely the reason why the actual victim *should* be permitted to sue, as this Court has already recognized. The tactics regarded by Domino's with such solicitude – a white-owned firm choosing to ignore discrimination against its employees in order to curry favor with the wrongdoer – is essentially the same as the union conduct held unlawful in *Goodman*, 482 U.S. at 669 (stating that "[a] union which intentionally avoids asserting discrimination claims * * * so as not to antagonize the employer and thus improve its chances of success on other issues * * * is liable under * * * § 1981") (internal quotation marks omitted).[33] Surely Congress did not intend that the protection of minority rights under section 1981 would depend in such circumstances on the good will or courage of the white-owned corporation.

---

[33]Of course, a corporation (unlike a union) would not violate section 1981 by failing to complain about discrimination against its employees. An employer would violate section 1981 only if, in order to placate a customer, it refused to hire racial minorities, or would not assign them to work for that customer.

4. Section 1981 Does Not Impose on Entrepreneurs a Hobson's Choice of Either Giving Up the Right to Incorporate or Forsaking Full Relief for Violations of the Right to Be Free from Discrimination.

Petitioners argue that an entrepreneur who chooses to do business through a corporation thereby forfeits the right to redress for personal injuries that would have been compensable under section 1981 if he or she had been doing business as a sole proprietorship. Petr. Br. 8, 26-27, 39. The interpretation of section 1981 advocated by petitioners would work just such a forfeiture, denying relief under section 1981 to minority entrepreneurs who for a variety of legal and practical reasons must incorporate. Congress, however, cannot have intended to impose such a Hobson's choice on the victims of racial discrimination. "This court is unaware of any authority suggesting that a person who lawfully invokes the incorporation laws thereby forfeits his rights under § 1981." *Rosales* v. *AT&T Info. Sys., Inc.*, 702 F. Supp. 1489, 1497 (D. Colo. 1988).

Neither the development of modern corporation law nor the emergence and complexity of federal income tax law could have been foreseen by the Congress that adopted the 1866 Civil Rights Act. But assuredly neither that Congress, nor the Congress which adopted the 1991 Civil Rights Act amending section 1981, intended to compel entrepreneurs to abandon the protections of, or the possibility of full redress under, section 1981 if they chose, often of absolute necessity, to conduct their business through a corporation. The imposition of such a forfeiture would codify in federal law the very type of discriminatory barriers to economic self-advancement that section 1981 was enacted to prevent.

Forcing minority entrepreneurs to forsake incorporation in order to retain the full protection of section 1981 would place them at a serious, perhaps fatal, competitive disadvantage relative to white entrepreneurs, and would therefore be in itself

an improper discriminatory practice. Faced with unlimited potential personal liability, a minority businessperson might attempt to reduce the resulting financial exposure by taking out additional liability insurance. But the cost of that insurance would have to be either passed on to his or her customers, raising prices and reducing competitiveness, or absorbed by the entrepreneur, resulting in lower profits than those earned by white competitors for selling the same good or services at the same price.

Domino's objects that stockholders and employees cannot ordinarily sue for a violation of a corporation's rights. But state corporate law[34] is of little relevance in determining what interests Congress intended to protect when it enacted section 1981. The primary purpose of section 1981 is to protect the *individuals* who may be the targets of intentional racial discrimination in the making and enforcement of contracts; any cause of action a corporation may have depends upon a showing of intentional discrimination against such an individual. In a case such as this, moreover, the very reason that Domino's actions were unlawful was that its officials disregarded the race-neutral corporate veil of JWM, and made their discriminatory decisions based on the race of the individual who owned and operated that corporation. It would be utterly incongruous to now permit Domino's to reduce its

---

[34] Contrary to petitioners' contentions, under state law shareholders *are* at times permitted to disregard the existence of the intermediate corporate entity where failing to do so would impair full enforcement of important state statutes. See, *e.g.*, *Cargill, Inc.* v. *Hedge*, 375 N.W. 2d 477, 478-79 (Minn. 1985) (holding that husband and wife owner-occupants of a farm could reverse pierce their family farm corporation to receive a homestead exemption from a creditor); *Roepke* v. *W. Nat'l Mut. Ins. Co.*, 302 N.W. 2d 350, 353 (Minn. 1981) (holding reverse pierce necessary to allow the "stacking" of decedent president and sole shareholder's corporate insurance policies); *U.S. Gypsum Co.* v. *Mackey Wall Plaster Co.*, 199 P. 249 (Mont. 1921) (holding sole stockholders of corporation the "equitable owners" of a debt owed to their corporation).

liability for that veil-piercing violation by invoking the very corporate formalities that Domino's itself unlawfully disregarded.

Such an interpretation of section 1981, moreover, would introduce a serious inequity into the administration of the statute. Section 1981 imposes liability on individual officials or supervisors who engage in unlawful discrimination. McDonald would be personally liable under section 1981 if in his capacity as JWM's president he were to discriminate on the basis of race against a JWM employee or a contractor such as Domino's itself. The underlying reason for allowing such suits is that the individual defendant was discriminating through the corporate entity. But if individual perpetrators can be held liable under such circumstances for violating the prohibitions of section 1981, it would be perverse to hold, as petitioners insist, that individual victims cannot seek vindication for the rights protected by section 1981.

D. Suits by Corporations Are Proper Under Section 1981 Because They Are Necessary for Full Enforcement of the Section 1981 Prohibition Against Racial Discrimination Against Individuals.

The lower courts have uniformly, and correctly, held that corporations can sue when they are injured by discrimination based on the race of the individuals with whom they do business.[35] But such suits are permissible, not because contracting corporations are the sole (or even primary) intended beneficiaries of section 1981, but because such actions are necessary to vindicate the statutory prohibition against intentional racial discrimination against individuals.

---

[35] *Parks Sch. of Bus., Inc.* v. *Symington*, 51 F.3d 1480, 1487-88 (CA9 1995); *Hudson Valley Freedom Theater, Inc.* v. *Heimbach*, 671 F.2d 702, 704-06 (CA2 1982); *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1212-14 (CA8 1972); *Rosales*, 702 F. Supp. at 1494-95.

In *Barrows* v. *Jackson*, 346 U.S. 249 (1953), Jackson was sued for damages because she had sold her house to non-Caucasians, and permitted them to occupy it, in violation of a restrictive covenant. The Court viewed racially restrictive covenants as violating the constitutional rights of the non-Caucasian buyers. See *id.* at 254 (explaining that such covenants will mean that a prospective seller "will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur"). It then held that the white seller, in defending the action, could rely on the illegality of racially restrictive covenants. See *id.* at 254-57 (holding that Jackson "[may] rely on the invasion of the rights of others in her defense to this action"). The antidiscrimination principle would be seriously impaired if the state could "punish [the seller] for not continuing to discriminate against non-Caucasians in the use of her property." *Id.* at 258.

Similarly, in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), a white plaintiff, Sullivan, was permitted to invoke the section 1982 rights of a black family, the Freemans, to whom he had leased a home. Sullivan had attempted to obtain permission for his tenants to use Little Hunting Park, a community park and playground owned by a corporation of which Sullivan was a shareholder. Under the bylaws of the corporation, tenants of homes owned by shareholders such as Sullivan were presumptively entitled to use of the park. The board of the corporation refused for discriminatory reasons to permit the Freemans to use the park. In retaliation for his actions on behalf of the Freemans, Sullivan was expelled from the corporation. This Court held that Sullivan could sue the corporation for damages, and could ground his action on the underlying violation of the Freemans' section 1982 rights. Compliance with section 1982 would be seriously impaired, the Court explained, if Sullivan could obtain no redress for his expulsion since permitting that kind of realiation "would give impetus to the perpetuation of racial restrictions on property." *Id.* at 237.

Section 1981 does not permit a corporation to be punished because it is the vehicle through which a black entrepreneur does business, because it is the means through which black workers provide services, or because it has black shareholders. When such a corporation sustains injuries because of racial discrimination forbidden by section 1981, effective enforcement of section 1981 requires, as it did in *Barrows* and *Sullivan*, that the corporation be able to obtain redress, even though the corporation itself has no racial identity and the actual target of the discrimination itself was instead one or more minority individuals. The purposes of section 1981 would be seriously undermined if there were no redress for such injuries to the corporation, and if that corporation were without legal recourse to avoid economic pressure from customers who objected to its minority shareholders or employees.

Petitioners object that a corporate owner-operator personally injured by section 1981 should not be permitted to sue because his or her claim is merely "derivative" of the underlying claim of the corporation that is also injured by the section 1981 violation. See Petr. Br. 20-21, 29-31, 35. In the context of a section 1981 claim such as this, however, this characterization of the legal rights and relationships is precisely backwards. Here, the claims of the corporation derive from the underlying section 1981 prohibition against discrimination against the minority individual who is the actual target of the discrimination, not vice versa.

II. Respondent Also Stated a Claim Under Section 1981 Because Petitioners' Racially Motivated Acts Intentionally Deprived Him of the Benefits of His Contracts With JWM.

Respondent has already shown why a section 1981 *plaintiff* need not be a formal signatory to the contract whose racially motivated breach triggers the lawsuit. See *supra* Part I. Nor must a section 1981 *defendant* be a formal signatory to the contract whose benefits the plaintiff has been denied. The rights guaranteed by the 1866 Civil Rights Act are protected

"against the actions of third parties" as well as against the actions of formal signatories, *Sullivan*, 396 U.S. at 237 (1969). Domino's racially discriminatory acts intentionally denied McDonald "enjoyment of [the] benefits * * * of the contractual relationship" he had with JWM. 42 U.S.C. 1981(b). Section 1981 therefore permits McDonald to bring suit against petitioners to compensate him for the contractual benefits he lost.[36]

Petitioners' argument to the contrary rests essentially on two subsidiary claims. First, they assert that the complaint "does not allege that [McDonald] was a party to any other contractual relationship that Domino's might have interfered with." Petr. Br. 31. To the contrary, the complaint clearly alleges facts showing two contractual relationships between McDonald and JWM Investments, Inc. – one as an employee, the other as a shareholder. Second, Domino's asserts that even if section 1981 recognizes claims against defendants who are not parties to the contract at issue, such claims are limited to cases where the defendant's purpose is to induce one of the parties to the contract "to violate * * * contractual commitments it had made." *Id.* at 32. That cramped construction disregards the plain language of section 1981, which protects individuals against injuries beyond common-law third-party interference. Even if JWM remained entirely willing to perform on its contract with McDonald, Domino's racially discriminatory acts impaired McDonald's right to "perform[]" his contract as well as his "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. 1981(b).

---

[36] It is entirely possible, for example, that an individual's supervisor might be held liable under section 1981 for discriminating against him, while his actual employer, with whom he has a contractual relationship, will not be liable because no policy-maker ratified the decision. See, *e.g.*, *Jett*, 491 U.S. at 707-08.

A. McDonald Had a Contractual Relationship with JWM.

The district court dismissed McDonald's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. But as this Court has repeatedly held, "[g]iven the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984)). Under that standard, the allegations in respondent's complaint plainly are sufficient to conclude that that there were two contractual relationships between McDonald and JWM: one in his capacity as a corporate employee and the other in his capacity as a corporate shareholder.

1. As "President" and "operator" of JWM, Pet. App. 11 (Compl. ¶¶ 10-11), McDonald had a contractual relationship with JWM as an employee. The complaint alleges that McDonald performed a wide range of activities with respect to JWM's dealings with Domino's. For example, McDonald negotiated and entered into leases on behalf of JWM. *Id.* at 11 (Compl. ¶¶ 10, 12). McDonald "put his full effort into getting the building constructed" that JWM agreed to erect at the Bonanza location. *Id.* at 12 (Compl. ¶ 15).

As a result of the services respondent actively performed for JWM, federal law required that he be considered an employee and be paid wages. *Spicer Accounting, Inc.* v. *United States*, 918 F.2d 90, 93 (CA9 1990) (requiring that compensation paid by a small corporation to a shareholder who actively performs services be characterized as wages subject to social security and unemployment taxes); *Veterinary Surgical Consultants, P.C.* v. *Comm'r*, 117 T.C. 141 (2001) (same); Rev. Rul. 74-44, 1974-1 C.B. 287 (1974) (same). The complaint alleges that entitlement to wages: among the remedies the complaint seeks are "front pay [and] back pay." Front pay and back pay operate to replace wages

an individual otherwise would have earned. See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Soc. Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 359, 364 (1946). Thus, the complaint necessarily alleges an obligation for some entity to pay McDonald a salary – namely, JWM.

Petitioners' citation of *Bellows* v. *Amoco Oil Co.*, 118 F.3d 268 (CA5 1997), cert. denied, 522 U.S. 1068 (1998), and the *Fletcher Cyclopedia*, see Petr. Br. 32, do not undermine this conclusion. First, in *Bellows*, the case had advanced far beyond the pleading stage: "*At trial*, Bellow produced no document and presented no testimony evidencing the terms, provisions, or conditions of any contractual relationship * * * ." 118 F.3d at 275 (emphasis added). It was under those very different circumstances that the Fifth Circuit found that the plaintiff had no employment contract. In this case, which was decided solely on the pleadings, McDonald has not yet had the obligation or opportunity to provide evidence to establish his contractual arrangements. Cf. *Haddle* v. *Garrison*, 525 U.S. 121, 127 (1998) (at-will employment arrangements are nonetheless contracts); *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 595 (2001) (statutory reference to "any contract" includes oral contracts).

Moreover, the very section of the *Fletcher Cyclopedia* that petitioners cite undercuts their argument. It notes that "the term 'employee' in both Model Business Corporation Acts, includes officers," 2 William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 266, at 12 (perm. ed., rev. vol. 1998), and Nevada's corporation law is based on the Model Act, see *Cohen* v. *Mirage Resorts, Inc.*, 62 P.3d 720, 726 n.10 (Nev. 2003). In particular, when the officer or owner of a corporation regularly performs work for a corporation, he will generally be treated as an employee. See also 2 Fletcher, *supra*, §§ 266.10, 266.20. That is precisely what the allegations in this case involve.

2. As the "owner" of JWM, Pet. App. 11 (Compl. ¶ 11), McDonald was necessarily party to a second contract with

JWM, this time in his capacity as shareholder of a Nevada corporation. Contrary to petitioners' suggestion, see Petr. Br. at 32, the relationship between a corporation and its shareholders is contractual. See 7A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 3634, at 216 (perm. ed., rev. vol. 1997) (corporate charters involve "a contract * * * between the corporation and its stockholders").

To be sure, if McDonald's injuries as a shareholder consisted of nothing more than a decrease in the value of his shares, he would not have suffered a *personal* injury. That injury would belong to the corporation as an entity, and it would be up to the corporate officers to decide whether to sue the defendants – here, petitioners – who had caused that loss of value. But, as respondent has already explained, *supra* at 18-19 & n.9, the complaint alleges that McDonald did suffer a distinct personal injury, an injury that Domino's intended to cause. It charges that petitioner Pear, acting on behalf of Domino's and motivated by racial animus, threatened McDonald that *he* "would experience serious financial [repercussions] and the loss of *his* business and financial position," Pet. App. 12 (Compl. ¶ 19) (emphasis added). The "pain and suffering, emotional distress, mental anguish, and humiliation" McDonald suffered as a result of Domino's discriminatory acts does not merge with the corporation's pecuniary losses. Rather, read in the context of the complaint as a whole, the allegations charge that Domino's humiliated and injured petitioner by impairing his status as the black owner of a corporation with which Domino's new personnel, for discriminatory reasons, *id.* at 13-14 (Compl. ¶ 24, 30), did not wish to do business. Cf. 19 Am. Jur. 2d Corporations § 1937 (2005).

B. Section 1981's Protection of Individuals' Contractual Rights Against Outside Impairment Extends Beyond Protecting Them Against Induced Breaches By the Other Contracting Party.

Despite petitioners' portrayal of *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), as only "suggest[ing]" or "arguably permitting" claims against discriminators who are not themselves in contractual privity with the plaintiff, Petr. Br. 31, the Court's opinion quite clearly authorized civil rights lawsuits against such defendants. Freeman, the black tenant, had a lease with Sullivan, and not with Little Hunting Park. And yet, the Court recognized that Freeman could bring suit:

> *The right to "lease" is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor.* Respondents' actions in refusing to approve the assignment of the membership share in this case was [sic] clearly an interference with Freeman's right to "lease."

Id. at 237 (emphasis added). *Sullivan* thus squarely recognized that a discriminator can be held liable for depriving an individual of benefits that would otherwise flow from a transaction to which the discriminator was not a party. Just as Little Hunting Park could be held liable to Freeman, even though the lease whose benefits Freeman was denied ran between him and Sullivan, so too Domino's can be held liable to McDonald, even though the contracts whose benefits he was denied ran between him and JWM.

1. The History of Section 1981 Reflects Congress's Intention to Reach Impairment of Protected Rights By Outside Parties.

The conclusion that section 1981 reaches third-party discriminators is firmly rooted in its history. The Congress

that originally enacted section 1981 was concerned primarily not with first-party refusals to contract, but rather with acts by outside parties that prevented newly freed slaves from entering into economic transactions with willing partners. This Court's more recent decisions and Congress's 1991 amendments to section 1981 only strengthen the conclusion that when section 1981 "guarantee[s] the personal right to engage in economically significant activity free from racially discriminatory interference," *Goodman*, 482 U.S. at 662, it guarantees that right against impairment "*from any source whatever.*" *Jones*, 392 U.S. at 424 (emphasis added).

Early in their brief, petitioners note that "[t]he principal object" of the 1866 Civil Rights Act "was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen." *Gen. Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 386 (1982); see Petr. Br. 15. But they fail to recognize that this history bears directly on McDonald's claims. The Black Codes, after all, did not involve the government's refusal to contract with black individuals. Rather, they forbade black people from entering into voluntary transactions with willing partners.

One of the key pieces of evidence on which Congress relied in enacting section 1981 was the Schurz Report. See *supra* p.16. That report was filled with examples of attempts by both governments and private individuals to prevent freedmen from pursuing or benefiting from contractual opportunities. For example, Opelousas, Louisiana, enacted an ordinance denying a black person the right to "sell, barter or exchange, any articles of merchandise or traffic within the limits of Opelousas without permission in writing from his employer, or the mayor, or president of the board." Schurz Report, *supra*, at 23. See also *id.* at 94 (reporting a substantially identical St. Landry ordinance); 1 Walter L. Fleming, Documentary History of Reconstruction 305-06 (1906) (referring to South Carolina statute mandating that "[n]o person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shopkeeper, or any other

trade, employment or business * * * on his own account and for his own benefit, or in partnership with a white person, * * * until he shall have obtained a license therefor from the Judge of the District Court"). The whole point of such laws was to prevent black individuals from trading with willing partners.

More particularly, both Schurz and members of Congress specifically identified actions that undermined blacks' ability to establish and benefit from their own businesses – that is, to be entrepreneurs – as a central problem. The freedman, Schurz reported, "is positively prohibited from working or carrying on a business for himself; he is *compelled* to be in the 'regular service' of a white man, and if he has no employer he is *compelled* to find one." Schurz Report, *supra*, at 24

> The opposition to the negro's controlling his own labor, carrying on business independently on his own account – in one word, working for his own benefit – showed itself in a variety of ways. * * * [For example,] the white citizens refuse to sign any bonds for the freedmen.

Id. at 24-25. Similarly, in responding to President Johnson's assertion that the Act was unnecessary, Senator Trumbull pointed to a newly enacted Mississippi law whose purpose was "to prevent any freedmen from doing any independent business, and to compel them to labor as employés." Cong. Globe, *supra*, at 1759. See also, *e.g.*, *id.* at 514 (statement of Rep. Eliot on the companion Freedman's Bureau bill that freedmen were being denied the ability to "select their own employers and to choose their own kind of service").[37]

---

[37] Although the Freedman's Bureau bill was not enacted, it was sponsored by Senator Trumbull, the author and primary sponsor of the 1866 Act. Accordingly, this Court has relied on its legislative history to interpret the 1866 Act. See, *e.g.*, *Jones*, 392 U.S. at 423 n.30.

Congress's concern with acts that prevented blacks from entering into and benefiting from contractual transactions quite clearly extended to misconduct by private parties, as this Court held in *Jones*, 392 U.S. at 436, *Runyon*, 427 U.S. at 170-71, and *Tillman*, 410 U.S. at 440. See, *e.g.*, Cong. Globe, *supra*, at 475, 500 (statements by Sen. Trumbull that customary deprivations of blacks' rights to make and enforce contracts would be subject to liability under the Act); *id.* at 1156 (statement by Rep. Thornton that "Congress has the power to punish any man who deprives a slave [sic] of the right of contract, or to the right to control and recover his wages"); *id.* at 1160 (reference by Rep. Windom to a report that black farmers had been wrongfully "notified that they must give up their leases" – leases that presumably they and the lessor had entered into voluntarily – "by citizens"). The frequent references to private violence in the legislative history often involved violence directed at intimidating blacks into abandoning contracts.

Section 1981 is not simply a federalized version of the common-law tort of tortious interference. That tort, as petitioners correctly note, applies to actions that induce a third person not to perform a contract with the plaintiff. Restatement (Second) of Torts § 766 (1979); see Petr. Br. 33. In other words, if *A* and *B* have a contract, and *C* induces *B* to violate the contract, then *A* has a claim against *C*. But in enacting section 1981, Congress was also (indeed, primarily) concerned with situations where, for racially discriminatory reasons, *C* causes *A* not to be able to perform *A*'s contract with *B*. Thus, even in situations where *B* remains willing and able to meet its obligations to *A*, section 1981 provides a remedy if *A* has been deterred or punished for seeking to exercise his right to enter into contracts.

Put concretely, even petitioners concede that section 1981 should provide a remedy for an individual if a company contracting with his employer persuaded the employer "to fire the employee, or to staff the employee on a different project, because of his race." Petr. Br. 32. But it is equally clear that

section 1981 must provide a remedy if a discriminator, instead of persuading a black worker's employer to fire him, forces the worker off the job by threatening to kill him if he does not quit or ask for a reassignment. In this second scenario, there would of course be no breach by the employer of the contract. Nonetheless, the employee has clearly been deprived of his ability to perform his employment contract and has also been deprived, at the very least, of some of the benefits that would otherwise have flowed from the contract.

The complaint in this case alleges a version of this second scenario. For racially discriminatory reasons, Domino's prevented McDonald from carrying out his duties as JWM's president and operator. The fact that JWM did not breach its contractual relationship with McDonald is simply immaterial.

Furthermore, section 1981 was intended to do more than protect black individuals' right to be subordinate employees in someone else's enterprise. It was intended as well to protect them in their ability to work for themselves, to be entrepreneurs. In the contemporary economy, that ability to do "independent business," Cong. Globe, *supra*, at 1758 (statement of Senator Trumbull), necessitates that they, like all other Americans, be able to form corporations, with the ensuing contractual status as a shareholder. See *supra* Part I.C.2. Here, too, discriminators' efforts to prevent blacks from acquiring and benefiting from shareholder status fall within the purview of section 1981. If, for example, the State of Nevada were to enact a statute denying black individuals the right to form corporations and work for themselves, that statute would surely violate 42 U.S.C. 1981 and 1982 as well as the Fourteenth Amendment. Because section 1981 reaches private conduct as well as governmental impairment, a private discriminator who acts with the intent to prevent a black individual from owning and obtaining benefits from his own business is also liable under section 1981.

2. The 1991 Amendments to Section 1981 Reinforce Its Coverage of Discriminators Who Impair an Individual's Opportunity to Reap the Full Benefits of His Contracts with Other Parties.

In 1991, Congress enacted two amendments to section 1981 that reinforce its coverage of actions by private parties undertaken with the purpose of depriving minority individuals of contractual opportunities.

New subsection 1981(c) provides that the right to make and enforce contracts is "protected against impairment by nongovernmental discrimination and impairment under color of State law." This provision explicitly "codified" this Court's decision in *Runyon* v. *McCrary*. H.R. Rep. No. 101-644, at 42 (1990).

New subsection 1981(b) provides an expansive definition of the term "make and enforce contracts" that includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." That provision responded to this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), interpreting the rights protected by section 1981 more narrowly not to include post-formation conduct.

Section 1981(b) confirms that section 1981 claims are not limited to racially motivated episodes of the narrow common-law tort of intentional interference with contract. Section 1981(b) makes clear that an individual's right to perform a contract – and not just his right to nondiscriminatory performance by the other party – falls within the protection of the statute. The complaint in this case unquestionably alleges that petitioners intentionally denied McDonald the ability to perform his job for JWM because he was black. Petitioner Pear refused to deal with McDonald, see Pet. App. 12-13 (Compl. ¶ 19-20), thereby impairing his ability to perform the parts of his job as President and operator of JWM that required him to interact

with a major customer. In addition, as a result of Domino's refusal to provide estoppel certificates, not only was McDonald unable to perform JWM's construction contracts with Domino's, but "he was unable to move forward with other projects" he might have performed on behalf of JWM. *Id.* at 14 (Compl. ¶ 25).

Moreover, section 1981(b) also expressly protects the right to "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The ability to "enjoy[]" the benefits of a contract will clearly be impaired if a contracting party is "punish[ed]" for having engaged in contractual behavior. Cf. *Barrows* v. *Jackson*, 346 U.S. at 258. The complaint alleges that petitioners deliberately drove JWM into bankruptcy because they had decided not to deal with minority-owned businesses and because of race-based animus against McDonald personally. The intent to ruin McDonald *personally*, see *id.* at 12 (Compl. ¶ 19), thus deprived him of the benefit of being a business owner.

3. Respondent's Claim Fits Within a Well-Recognized Category of Cases in Which Individuals Have Been Permitted to Sue for Racially Motivated Interference with Their Contractual Relationships.

Modern cases continue to deal with attempts by discriminators to suppress the ability of racial minorities to contract with third parties. A paradigmatic example is *Vietnamese Fishermen's Ass'n* v. *Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981), in which defendant Ku Klux Klan members sought to intimidate Vietnamese-born fishermen into abandoning their shipping business through such tactics as burning the fishermen's boats and pointing weapons at the fishermen and their families.

Courts have consistently recognized, both before and after the 1991 amendments, that section 1981 reaches outsider impairment of an individual's ability to make, perform, and enjoy the benefits of contractual relationships. See, *e.g.*,

Harris v. *Allstate Ins. Co.*, 300 F.3d. 1183, 1197 (CA10 2002) ("Relief is available under § 1981 where a party discriminatorily uses its authority to preclude an individual from securing a contract with a third party."); *Spriggs* v. *Diamond Auto Glass*, 165 F.3d 1015 (CA4 1999) (defendants included a company president and the plaintiff's supervisor, as well as the employer with whom he had had a contractual relationship); *Daniels* v. *Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906 (CA7 1991) (defendant was a union whose discriminatory job referral system denied the plaintiff the ability to enter into employment contracts); *Des Vergnes* v. *Seekonk Water Dist.*, 601 F. 2d 9 (CA1 1979) (defendant was a water district whose racially motivated refusal to include the plaintiff developer's real estate within the district interfered with the plaintiff's ability to enter into contracts with black home buyers).[38]

---

[38] See also, *e.g.*, *Faraca* v. *Clements*, 506 F.2d 956 (CA5 1975) (suit against the director of a Georgia center for the developmentally disabled that refused to hire plaintiff as a cottage administrator because plaintiff was in an interracial relationship, even though plaintiff's contract would have been with the state of Georgia, not with defendant); *Belfast* v. *Upsilon Chapter of Pi Kappa Alpha Fraternity at Auburn*, 267 F. Supp. 2d 1139, 1144 (M.D. Ala. 2003) (suit by pizza delivery man attacked for racial reasons because the attack interfered with his employment; explaining the viability of third-party interference claims and relying expressly on amended section 1981(b) to support its conclusions); *Morrison* v. *Am. Bd. of Psychiatry and Neurology, Inc.*, 908 F. Supp. 582 (N.D. Ill. 1996) (suit against credentialing organization whose actions allegedly interfered with the plaintiff's ability to enter into contracts with medical facilities); *Collin* v. *Rector and Bd. of Visitors of Univ. of Va.*, 873 F. Supp. 1008, 1015-16 (W.D. Va. 1995) (defendants included deans and faculty members whose racially motivated actions resulted in plaintiff's denial of tenure at the university); *Coleman* v. *Dow Chemical Co.*, 747 F. Supp. 146, 155 (D.Conn. 1990) (allowing section 1981 claim against the plaintiff's supervisor as well as the employer with

The cases demonstrate two things. First, they show that the outside impairment of minority individuals' contractual opportunities that motivated passage of section 1981 in the first place remains a serious problem today. Second, they show that the recognition of claims against third-party discriminators has not produced the flood of meritless lawsuits petitioners prophesize. Thus, this Court need not impose an unprecedented contractual privity requirement on section 1981 claims.

The claims that are cognizable under section 1981 share three critical elements. They involve (1) purposeful racial discrimination by the defendant (2) directed intentionally at a person who is the plaintiff or a party with whom the plaintiff is in privity that (3) is intended to impair the formation, performance, enforcement, or enjoyment by the plaintiff of benefits of a specific contractual opportunity.[39]

Although none of these elements requires a contractual relationship between the plaintiff and the discriminator, they nonetheless cabin the category of cases that can be brought. For example, a plaintiff whose car was destroyed in a racially motivated firebombing would fail to state a section 1981 claim if he alleged only that the defendant "interfered with his housing rights" and "intimidated him"; while the defendant's act could conceivably be related to some potential contractual opportunity, if a plaintiff fails to point to any specific contract

---

whom he had a contractual relationship; relying on *Sullivan* and the common origins of sections 1981 and 1982 in recognizing such claims); *Coley* v. *M&M Mars, Inc.*, 461 F. Supp. 1073, 1076 (M.D. Ga. 1978) (defendants included the plaintiff's co-workers who interfered with his contractual relationship with his employer).

[39] See *Bediako* v. *Stein Mart, Inc.*, 354 F.3d 835, 839 (CA8 2004); *Hampton* v. *Dillard Dept. Stores, Inc.*, 247 F.3d. 1091, 1101-02 (CA10 2001); *Green* v. *State Bar of Tex.*, 27 F.3d 1083, 1086 (CA5 1994); *Mian* v. *Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (CA2 1993).

with which the defendant had interfered, he fails to state a claim. See *Stackhouse* v. *DeSitter*, 566 F. Supp. 856, 858-59 (N.D. Ill 1983). Cf. *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306, 311-12 (CA2 1975) (recognizing plaintiff's satisfaction of this element where he alleged that defendant, by punishing him, had impaired his ability to sell his house to an African American; plaintiff had identified a specific contractual right). See also *Southend Neighborhood Improvement Ass'n* v. *St. Clair County*, 743 F.2d 1207, 1211 (CA7 1984) (explaining that a "causal nexus" must exist between the defendant's behavior and the contract right impaired).

By contrast, in this case, the complaint alleges each of the elements of a section 1981 claim against a third-party discriminator. First, it alleges racial animus by petitioners. See Pet. App. 13-14, 16 (Compl. ¶¶ 24, 43-45). Second, the complaint alleges that petitioners' racially discriminatory conduct was directed intentionally at McDonald and the business he owned. See *id.* at 12-14, 16 (Compl. ¶¶ 19, 24, 47). Thus, respondent was not an incidental victim of petitioners' discriminatory conduct, but rather its primary target. Third, given the context of petitioners' discriminatory actions, which were directed at respondent in his capacity as owner-operator or JWM, the complaint clearly alleges that Domino's discrimination impaired his contracts with JWM. See *id.* at 12-14, 16 (Compl. ¶¶ 19-21, 24-26, 30, 47).

The critical flaw in petitioners' analysis is that they assume that if "[s]ection 1981 authorizes suit only by persons whose own right to 'make and enforce contracts' has been infringed," Petr. Br. 25, this necessarily means that the plaintiff's right must involve a contract *with* the defendant. To the contrary, as long as the plaintiff is alleging that the discriminator intentionally impaired his right to make *a* contract, the fact that the discriminators' own contractual rights and responsibilities are not at issue is irrelevant.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

Eric Schnapper
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98185

Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Matthew Q. Callister
CALLISTER & REYNOLDS
823 South Sixth Street
Las Vegas, NV 89101

Allen Lichtenstein
(Counsel of Record)
3315 Russell Road, No. 222
Las Vegas, NV 80120
(702) 433-2666

David T. Goldberg
99 Hudson Street
New York, NY 10013

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

September 22, 2005

FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 27 2005
OFFICE OF THE CLERK

No. 04-593

In the Supreme Court of the United States

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

PETITIONERS,

v.

JOHN MCDONALD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

ELISA D. GARCIA C.
JOEL F. GRAZIANI
DOMINO'S PIZZA LLC
30 FRANK LLOYD WRIGHT DRIVE
ANN ARBOR, MI 48106-0997
(734) 930-3678

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. MCDONALD MAY NOT ENFORCE JWM'S CONTRACTS 2

A. Section 1981 Protects Only Contract Rights 2

B. McDonald's Semantic Arguments Lead to Unbounded Liability 4

C. The "Actual Target" Distinction is Inconsistent with § 1981 and Unworkable 5

1. This Court's Cases Do Not Support McDonald's "Actual Target" Theory 5

2. The "Actual Target" Test Is Unworkable 8

II. THERE IS NO VIABLE § 1981 CLAIM BASED ON ANY MCDONALD - JWM CONTRACT 10

A. The Complaint Alleges No Relevant Contract, or Impairment of Any Contractual Rights 11

B. McDonald Has No Claim for Derivative Injuries from a Violation of JWM's Rights 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Adams v. Pan American World Airways, Inc.,
828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988), *and cert. denied*, 485 U.S. 485 U.S. 961 (1988) 20

Associated General Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 17, 19, 20

Baldwin v. Reese,
541 U.S. 27 (2004) 11

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,
402 U.S. 313 (1971) 18

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 16

Blue Shield of Virginia v. McCready,
457 U.S. 465 (1982) 18

Brian Clewer, Inc. v. Pan American World Airways, Inc.,
674 F. Supp. 782 (C.D. Cal. 1986) 20

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) 13

Burnett v. Grattan,
468 U.S. 42 (1984) 2

TABLE OF AUTHORITIES—Continued

Page(s)

Camacho v. Puerto Rico Ports Authority,
369 F.3d 570 (1st Cir. 2004) 9

Consolidated Rail Corp. v. Gottshall,
512 U.S. 532 (1994) 4

Danco, Inc. v. Wal-Mart Stores, Inc.,
178 F.3d 8 (1st Cir. 1999), *cert. denied*, 528 U.S.
1105 (2000) 5

Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,
416 F.3d 1025 (9th Cir. 2005) 10

Federal Election Commission v. NRA Political Victory Fund,
513 U.S. 88 (1994) 6

Galabya v. New York City Board of Education,
202 F.3d 636 (2d Cir. 2000) 13

General Building Contractors Association v. Pennsylvania,
458 U.S. 375 (1982) 13

Georgia v. Rachel,
384 U.S. 780 (1966) 2

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 6

Haugerud v. Amery School District,
259 F.3d 678 (7th Cir. 2001) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Hollins v. Atlantic Co.,
188 F.3d 652 (6th Cir. 1999) 13

Holmes v. Securities Investor Protection Corp.,
503 U.S. 258 (1992) 2, 15, 16, 17, 18

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) 17

Jackson v. Birmingham Board of Education,
125 S. Ct. 1497 (2005) 19

Jett v. Dallas Independent School District,
491 U.S. 701 (1989) 16

Lipshie v. Tracy Investment Co.,
566 P.2d 819 (Nev. 1977) 4

Moran v. Aetna Life Insurance Co.,
872 F.2d 296 (9th Cir. 1989) 11

Nathan P. v. West Springfield Public Schools,
362 F.3d 143 (1st Cir. 2004) 11

Olzman v. Lake Hills Swim Club, Inc.,
495 F.2d 1333 (2d Cir. 1974) 7

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 2, 3, 7

Pepe v. GMAC,
604 A.2d 194 (N.J. Super. Ct. App. Div. 1992) 12, 13

TABLE OF AUTHORITIES—Continued

Page(s)

Pillsbury, Madison & Sutro v. Lerner,
31 F.3d 924 (9th Cir. 1994) 20

Pitchford v. PEPI, Inc.,
531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S.
935 (1976) 12

Potthoff v. Morin,
245 F.3d 710 (8th Cir. 2001) 10, 12

Powers v. Ohio,
499 U.S. 400 (1991) 10

Pryor v. Sloan Valve Co.,
487 N.W.2d 846 (Mich. Ct. App. 1992) 14

Runyon v. McCrary,
427 U.S. 160 (1976) 6

Shaare Tefila Congregation v. Cobb,
481 U.S. 615 (1987) 7

Sherman v. British Leyland Motors, Ltd.,
601 F.2d 429 (9th Cir. 1979) 4

Sibley Memorial Hospital v. Wilson,
488 F.2d 1338 (D.C. Cir. 1973) 9

Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,
245 U.S. 531 (1918) 15

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Tillman v. Wheaton-Haven Recreation Association,
410 U.S. 431 (1973) 7

Trafficante v. Metropolitan Life Insurance Co.,
409 U.S. 205 (1972) 16

United States v Standard Oil,
332 U.S. 301 (1947) 17

Warth v. Seldin,
422 U.S. 490 (1975) 16

Youakim v. Miller,
425 U.S. 231 (1976) 11

Zaklama v. Mt. Sinai Medical Center,
842 F.2d 291 (11th Cir. 1988) 9

STATUTES

18 U.S.C. § 1964(c) 2

42 U.S.C. § 1981(a) 4
42 U.S.C. § 1981(b) 3
42 U.S.C. § 1981(c) 19

42 U.S.C. § 1983 10

OTHER AUTHORITY

11 Arthur Linton Corbin, *Corbin on Contracts*
§ 1038 (interim ed. 2002) 12

TABLE OF AUTHORITIES—Continued

Page(s)

2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 (perm ed., rev. vol. 1998) 11

Restatement (Second) of Agency § 363 (1958) 5

Supreme Court Rule 15.2 11

ARGUMENT

McDonald's central contention is that an "actual target" of discrimination may recover under 42 U.S.C. § 1981 even if he has suffered no injury to the right to "make and enforce contracts." That theory is untenable for three reasons. First, McDonald's theory is inconsistent with the statute. This "actual target" rhetoric is a way of evading the central fact that McDonald's own right "to make and enforce contracts" on the same terms as white citizens has not been violated. Even if he was the "actual target" of a racial slur or racial animus, JWM was the only "actual target" of alleged conduct that would violate § 1981. Second, it is wrong as a description of this Court's cases. This Court has allowed recovery under § 1981 by contracting parties, or by intended third-party beneficiaries, but has never endorsed claims by third parties who lack any contract rights. Third, the "actual target" distinction supplies no coherent limiting principle. It opens the door to endless piggy-back lawsuits by plaintiffs claiming to be the "actual target" of some form of discrimination incident to a violation of someone else's right "to make and enforce contracts."

McDonald also argues in the alternative that Domino's can be liable for interfering with his own alleged contractual relations *with JWM*. First, this is an entirely new theory of relief never raised until the merits stage in the Supreme Court, and is therefore forfeited. Second, the complaint simply does not allege any such contractual relationship, nor that Domino's actually interfered with, or intended to interfere with, McDonald's contractual relations with JWM. Finally, the only injuries directly inflicted on McDonald were emotional harms stemming from an alleged racial slur. Dignitary harms like these have little to do with the contractual rights protected by § 1981 and, on these facts, would not even be actionable under Title VII if inflicted by an employer. The rest of McDonald's alleged injuries are entirely derivative—downstream consequences of a

violation of *JWM*'s rights under § 1981. This Court has repeatedly refused to recognize causes of action for derivative injuries, even when a statute authorizes suit by "any person injured ... by reason of" a statutory violation. *E.g.*, 18 U.S.C. § 1964(c); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). McDonald offers no persuasive argument for permitting such recovery to a sole shareholder through the implied right of action recognized under § 1981.

I. MCDONALD MAY NOT ENFORCE JWM'S CONTRACTS

A. Section 1981 Protects Only Contract Rights

McDonald continually seeks to obscure the actual contours of § 1981 by arguing that it prohibits all discrimination that could interfere with a plaintiff's full and equal participation in the economy. McDonald believes that § 1981 protects a broadly defined right to engage in "economically significant activity," Resp. Br. 15; to "hold and enjoy the proceeds of [one's] toils," *id.* at 16; and to "participate in the economic life of the nation" free from racial discrimination, *id.* at 17. Thus, according to McDonald, he has stated a claim under § 1981 to "conduct business ... unimpeded by racial discrimination." *Id.*

Congress did not create a cause of action for any person injured by the effects of racial discrimination in the economy; it guaranteed the same right "to make and enforce contracts." This Court has recognized that § 1981 only applies to "specific activities, such as making contracts," *Burnett v. Grattan*, 468 U.S. 42, 44 n.2 (1984), and "protect[s] a limited category of rights." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). Any doubt on that score was firmly laid to rest in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, a credit union teller brought a § 1981 claim against her employer alleging that she was harassed and ultimately discharged because of her race. Discriminatory termination is obviously a vastly larger threat to the ability of racial minorities to participate

equally in the economy than the emotional harms and derivative financial injuries alleged here. Nonetheless this Court recognized that "[t]he most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief." *Patterson*, 491 U.S. at 176 (alterations in original). This Court held that § 1981 protected *only* a narrowly defined right first to "make" contracts and then to enforce any breach through ordinary legal process, and that discriminatory performance or termination did not violate the statute so long as the plaintiff still had access to the courts. *Id.* at 177-78. That holding is flatly inconsistent with McDonald's broad claims about the original intent of § 1981. Although Congress partially superseded *Patterson* by statute, the 1991 amendments clarified only that § 1981 now applies to "the making, performance, modification, and termination *of contracts*," and protects the "benefits, privileges, terms, and conditions *of the contractual relationship*." 42 U.S.C. § 1981(b) (emphasis added).

McDonald protests that enforcing the plain language of § 1981 may force minority businessmen into an unfair choice between the benefits of incorporation and the protections of § 1981. Resp. Br. 31-33. He argues that, for purposes of the § 1981 right to "make and enforce contracts," a minority entrepreneur should be permitted either to (a) invoke the contract rights of his employer, even though he is neither a party to nor an intended beneficiary of that contract, or (b) disregard the separate existence of his wholly-owned corporation and be treated as a party to the corporation's contracts. *Id.* The essence of his position is that subjecting the choices of minority entrepreneurs to precisely the same contract law consequences as white entrepreneurs will fail to fully implement the vision of eradicating all vestiges of racial discrimination from our economy.

That is not a permissible interpretation of § 1981. As this Court recognized in *Patterson*, § 1981 is not a comprehensive charter of economic equality. It guarantees only the "same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The rights claimed by McDonald are not the "same right[s]" enjoyed by white citizens, but entirely new rights never previously recognized by the law of Nevada or any other state. *See, e.g., Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824-25 (Nev. 1977) (third party must be specifically intended beneficiary); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 440 n.13 (9th Cir. 1979) (president/sole shareholder is at most an incidental beneficiary). The plain language indicates that Congress did not authorize the federal courts to disregard the consequences of state contract and corporations law when doing so would broaden the coverage of § 1981.[1]

B. McDonald's Semantic Arguments Lead to Unbounded Liability

McDonald argues that a person who does not have or desire any contract of his own may nonetheless bring claims under § 1981 if he is seeking to "make" or "enforce" a contract as an agent on behalf of a principal. Resp. Br. 11-12. But while an agent may "make" a contract for a principal, and a judge may "enforce" a contract by litigants, these extended semantic possibilities are not the meaning of "make" or "enforce" intended by § 1981. An agent contracting on behalf of a principal has no *personal* contract

---

[1] McDonald commits a similar error by complaining that, under petitioners' interpretation of § 1981, mental anguish and humiliation will not be recoverable when a corporation possesses the contract rights at stake because corporations do not have feelings. Resp. Br. 27-28. That is true, but simply a neutral principle of state contract law. White citizens are equally bound by that principle, and by the related rule that emotional injuries suffered by witnesses to an actionable wrong cannot recover. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

right at stake, and so any interference with that process impairs only the principal's right to "make and enforce contracts." *See* Restatement (Second) of Agency § 363 (1958) (agents making contracts on behalf of principals have no individual contract claims).

The dangers inherent in these semantic games become obvious when McDonald points out that § 1981 now covers the "performance" of a contract, and argues that employees necessarily "perform" their employers' contracts in some sense. Resp. Br. 13. That approach would create a truly breathtaking cause of action. If GM cancels a contract with IBM, every IBM employee who would have performed some work duties related to that contract would have an individual § 1981 cause of action against GM for whatever "personal" injuries he or she can allege. Presumably those injuries would include derivative harms from lost bonus or promotion opportunities as well as emotional injuries. That cannot be the law. *See Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999) ("Nothing in section 1981 provides a personal claim ... to one who is merely affiliated—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract."), *cert. denied*, 528 U.S. 1105 (2000).

C. The "Actual Target" Distinction is Inconsistent with § 1981 and Unworkable

McDonald attempts to disguise the breadth of his position by suggesting that only the "actual target" of discrimination can sue. But there is no basis in the text or this Court's cases for applying § 1981 to an "actual target" of discrimination who has not suffered any injury to his own right "to make and enforce contracts." That test also fails to cabin the reach of the statute in any sensible way.

1. This Court's Cases Do Not Support McDonald's "Actual Target" Theory

McDonald claims that several of this Court's prior § 1981 cases support his "actual target" theory. They do not.

First, this Court has held that cases assuming statutory standing without discussion are "drive by" rulings not entitled to precedential weight. *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). Yet McDonald's entire argument depends on the assumption that because this Court did not address statutory standing in prior § 1981 cases, then standing necessarily existed.

Second, none of the cases cited by McDonald employ or discuss the "actual target" distinction he advocates, and most are more readily explained by the principle that an intended third-party beneficiary has standing to "enforce" a contract. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the plaintiffs were minor children and their parents who sued two schools on the ground that the schools denied admission to the children because of their race. In holding that § 1981 covered private contracting, this Court never questioned that the children had sufficient contract rights at stake. The children were clearly intended beneficiaries, so it is unsurprising that no party or court raised the issue.

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), involved union workers who sued their employer and unions for racial discrimination. *Goodman*, like *Runyon*, fits comfortably into the intended third-party beneficiary rubric; of course the minority employees were the intended beneficiaries of a contract between their employer and their union prohibiting discrimination in employment. Moreover, the plaintiffs alleged that the union actually barred their access to legal process, and thus violated their right to "enforce" their contract rights. As this Court noted in *Patterson*, the plaintiffs in *Goodman* had stated a viable claim because § 1981 applies to private efforts to "obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations," at least where the unions "bear explicit responsibilities to process grievances, press claims, and represent member in disputes over the terms of binding

obligations that run from the employer to the employee." *Patterson*, 491 U.S. at 177 (citing *Goodman*).

McDonald's discussion of *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), is a particularly bold attempt to transform this Court's silence on an issue it was never asked to address into a holding. Nowhere in this Court's two-page opinion in *Shaare Tefila* did this Court ever mention, let alone analyze, exactly what the property right held by the congregants themselves was, and whether that right was sufficient to create statutory standing under § 1982. Nor is there any reason to believe this Court would have been thinking of the issue since it was not included in the question presented or raised by the parties. In any event, some courts have held that because § 1982's text protects an ill-defined right to "hold" property, even invited guests literally fit within the protection of the statute. *Cf. Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974). Section 1981's language is much narrower.[2]

In *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), the plaintiffs included a black family challenging the center's membership policy as well as a white family and their black guest challenging its guest policy. The plaintiffs sued under § 1981, § 1982, and Title II of the Civil Rights Act of 1964. This Court addressed primarily the black family's claim under § 1982 to become members. This Court held that the center was not a private club, and consequently was subject to § 1982. As to the guest policy claim, this Court merely noted that "[o]n remand the District Court will develop any necessary facts concerning the adoption of the guest policy and will evaluate the claims of the parties." *Id.* at 440. This Court made no

---

[2] The other § 1982 case McDonald cites, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), likewise does not help him. While this Court permitted the white homeowner to pursue a claim arising from his expulsion for transacting with a black tenant, the homeowner, unlike McDonald, actually had his own property (and contract) rights at stake.

mention of the guest's standing. In any event, her standing under § 1981 could be justified on the ground that the white family sought to make a contract allowing black guests of which she would be the intended third party beneficiary.

2. The "Actual Target" Test Is Unworkable

In any event, McDonald's proposed "actual target" distinction is based more on rhetoric than substance. In what sense was McDonald the "actual target" of this alleged conduct, if he did not suffer any injury to his own personal right to "make and enforce contracts"? There are several possibilities, but none of them suggests a workable framework for extending § 1981 beyond the statutory text.

McDonald may be alleging simply that he was the "actual target" of a racial slur and racial animosity from individual petitioner Debbie Pear Phillips. But § 1981 guarantees the right to "make and enforce contracts" on the same terms as white citizens, not a general right to be free from racial insults. The only "actual target" of alleged racial discrimination in *contracting* here was JWM. Nothing in the language, history, or structure of § 1981 suggests that Congress intended to create a remedy for a person who was the "actual target" of racial slurs or non-contractual racial animus, merely because that conduct happens to be incident to, or transactionally related to, some other conduct that violates the actual § 1981 rights of a different person.

Any such cause of action would be both radical and arbitrary. Federal law does not generally provide any cause of action for emotional or dignitary injuries stemming from a racial insult like this one. Persons who suffer such injuries in the general neighborhood of a violation of § 1981 are no more deserving than persons who suffer such insults on the street. And ordinary employees have no redress for racial insults from their own employers unless those insults become so severely or pervasively abusive that they create a hostile work environment. Pet. Br. 33-35. In the world McDonald proposes, an employee would have no remedy if

he suffered a simple racial insult from his employer, and generally no remedy if he suffered a racial insult from an outsider—but would have a remedy if that outsider later breached a contract with his employer for discriminatory reasons. That is illogical and threatens to open the floodgates to individual employee litigation. If GM cancels a contract with IBM for reasons believed to be racially discriminatory, then every minority employee of IBM could claim to be the "target" of that discrimination and sue for emotional injuries (and financial injuries) incident to it.[3]

McDonald might instead be claiming to be the "actual target" of the alleged discrimination against JWM in the sense that his ethnicity was arguably the *reason* for that discrimination. But nothing in § 1981 suggests a cause of action for persons who are the *reason* for contractual discrimination against someone else. That rule would also be arbitrary and unworkable. If GM cancels its contract with IBM, and IBM's employees believe that the reason is GM's general aversion to working with a company with so many minority employees, then every minority employee of IBM would be the "reason" for the discrimination and would have an individual cause of action against GM on this theory. If it were later revealed that GM canceled the contract because it wished to avoid one particular minority employee of IBM, then that one employee would have an individual cause of action but the rest would not—even though they may all have suffered quite similar dignitary (and derivative financial) injuries. And pushed to its logical limits the theory simply becomes absurd. If he can allege a racial

---

[3] McDonald wrongly suggests that his approach is necessary to ensure that temporary workers and subcontractors are protected from serious discrimination by their principal supervisors. The lower courts have recognized that such supervisors can be liable under both Title VII and § 1981 as de facto employers. *See, e.g., Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973); *Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 574-75 (1st Cir. 2004); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 293-95 (11th Cir. 1988).

motive, a minority spokesman or celebrity who produces an advertisement for a company would have a personal cause of action against any prospective customer that does not buy the product. A prominent black politician who eats at a particular restaurant would have a cause of action against white patrons who avoid that restaurant because of his presence. The students at a historically black college would have a cause of action against white students who choose not to enroll. None of this has anything to do with the specific interests that § 1981 was designed to protect.[4]

II. THERE IS NO VIABLE § 1981 CLAIM BASED ON ANY MCDONALD - JWM CONTRACT

Perhaps recognizing that he is in no position to "make and enforce" the JWM-Domino's contracts, McDonald now suggests that Domino's can be liable for denying him the right to "make and enforce contracts" *with JWM*. McDonald never raised this argument in his opposition to the motion to dismiss, his briefs to the Ninth Circuit, or his opposition to certiorari. Neither of the courts below considered it. It is

---

[4] McDonald, and several States as amici, argue that States need not be concerned about the scope of liability under § 1981 because they would be liable anyway under the Equal Protection Clause as enforced through 42 U.S.C. § 1983. Although both § 1981 and the Equal Protection Clause require intentional discrimination, they are not necessarily "otherwise co-extensive." *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 416 F.3d 1025, 1038 (9th Cir. 2005). The Ninth Circuit's interpretation of § 1981 here would permit anyone affected by alleged discrimination to sue, without regard to whether he was discriminated against himself, or even a minority. *See* Alabama Br. 2, 30. Third-party standing principles plainly would preclude an equal protection challenge in similar circumstances. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 410-15 (1991). And the lower courts have imposed strict limitations on shareholder/employee standing under § 1983 that are clearly incompatible with McDonald's interpretation of § 1981. *See, e.g., Potthoff v. Morin*, 245 F.3d 710 (8th Cir. 2001) (sole shareholder lacks standing under § 1983 to sue for injuries derivative of harm to his corporation, such as lost salary and commissions). If § 1981 and § 1983 *are* coextensive, those principles provide another basis for rejecting this claim. Regardless, the States do have a keen interest in seeing this construction of § 1981 corrected.

forfeited.[5] Regardless, the complaint will not support such a theory. It does not genuinely allege any relevant contract between McDonald and JWM, or intentional impairment of that contract. And even if a hypothetical contract could be divined from the complaint, his claim violates the venerable presumption against recovery for derivative injuries.

A. The Complaint Alleges No Relevant Contract, or Impairment of Any Contractual Rights

McDonald's theory of this case has always been that Domino's wrongfully breached its contracts with JWM. The complaint's Statement of Facts never once mentions any contract between JWM and McDonald, and the Cause of Action section focuses exclusively on the allegation that Domino's breached its contracts with JWM. Pet. App. 11-17.

McDonald argues that he has an employment contract with JWM because the federal tax code would probably treat him as an "employee" subject to employment taxes. Resp. Br. 37. But characterizing someone as an "employee" for purposes of a federal tax statute does not create a contract under state law. Likewise, the fact that the Model Business Corporations Act treats officers as "employees" for some purposes does not create a contract.[6]

---

[5] *See Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (argument raised for first time in respondent's merits brief deemed waived); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). Even in the context of a motion to dismiss, a defendant has a basic obligation to explain to the court *why* his complaint states a viable claim. *See Nathan P. v. W. Springfield Pub. Schs.*, 362 F.3d 143, 146 (1st Cir. 2004); *cf. Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 300 (9th Cir. 1989). And the petition for certiorari stated that "there is no employment contract" at issue and that "McDonald asserted no independent ... right of his own in this case." Pet. 9, 14. This Court's Rule 15 required McDonald to identify any perceived misstatements in the petition (Sup. Ct. R. 15.2); he did not.

[6] Fletcher notes that the Model Act's definition of "employee" includes officers only "for the purpose of making officers eligible for loans from the corporation." 2 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 266 at 12 n.8 (perm. ed., rev. vol. 1998).

McDonald strains to infer "an obligation for some entity to pay McDonald a salary" from the complaint's cryptic demand for "front pay [and] back pay." Resp. Br. 37-38. But a boilerplate request for remedies does not remotely establish a contractual entitlement to wages. McDonald's claim to have lost "pay" is just a transparent repackaging of his right, as sole shareholder, to JWM's net profits—a status that even he concedes cannot support standing under § 1981. The lower courts have consistently rejected such evasions.[7]

Indeed his own brief concedes that he had no genuine entitlement to wages. As McDonald acknowledges, any salary obligations JWM "actually paid or was still obligated to pay" were recoverable *by JWM* in its own breach of contract action against Domino's, and therefore have already been fully compensated by the settlement. Resp. Br. 28. McDonald argues that his demand for backpay under § 1981 is nonetheless still viable because it seeks "contract payments from Domino's [that] would have been used to pay an employee who never became entitled to wages at all." *Id.* In other words, to avoid the bar on duplicate recovery he admits JWM owed him nothing.[8]

---

[7] *See, e.g., Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97-98 (3d Cir. 1975) ("Mr. Pitchford alleged that his salary as president of the firm was less than it would have been ... . Mr. Pitchford cannot, however, obtain standing merely by shifting profit from his shareholder pocket to his officer pocket."), *cert. denied*, 426 U.S. 935 (1976); *Potthoff*, 245 F.3d at 716-18 (sole shareholder lacks standing under § 1983 to sue for injuries derivative of harm to his corporation, such as lost salary and commissions); *Pepe v. GMAC*, 604 A.2d 194, 196 (N.J. Super. Ct. App. Div. 1992) ("The law is clear and uniform: shareholders cannot ... assert individual claims for wages or other income lost because of injuries assertedly done to their corporations," including losses sustained because of personal guarantees of corporate debts.).

[8] That analysis is wrong as a matter of contract damages law in any event. Even if JWM would have ultimately paid out its net profits at the end of the year to McDonald as discretionary "salary" rather than as dividends, the loss of those profits is not an expense saved by the breach. *See, e.g.*, 11 Arthur Linton Corbin, *Corbin on Contracts* § 1038, at 206

McDonald in fact repeatedly concedes that "JWM did not breach its contractual relationship with McDonald." Resp. Br. 44. His theory instead is that "Domino's prevented McDonald from carrying out his duties as JWM's president and operator," *id.*, by "impairing his ability to perform the parts of his job ... that required him to interact with a major customer," *id.* at 45-46. That is not a cognizable injury to his right to "make and enforce contracts." Employees have no implied contractual right to work on a specific client's matters. And since McDonald kept his job title, benefits, and responsibilities, this change did not even alter the "terms and conditions" of his employment as that phrase is understood in Title VII.[9] McDonald's suggestion that an employee suffers an actionable injury to his ability to "perform" his employment contract whenever his employer loses a client would be a radical innovation. *Supra* at 5; Pet. Br. 32-33. Moreover, there is no allegation that Domino's knew about any employment contract between McDonald and JWM, or intended to impair his employment. Pet. Br. 25 n.12. Section 1981 prohibits only intentional discrimination. *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). The complaint alleges that Domino's wanted to end its own relationship with JWM and McDonald. It alleges that Ms. Phillips threatened "serious financial

---

(interim ed. 2002) ("The only saving that is to be deducted is the saving of expense with respect to performance by the plaintiff that the defendant's breach has made unnecessary"). McDonald's analysis would let persons breach contracts with small corporations with impunity, by claiming that any eventual profit would have been taken out of the company as salary.

[9] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) ("significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different job responsibilities, or a decision causing a significant change in benefits"); *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (change "'must be more disruptive than ... an alteration of job responsibilities.'") (citation omitted); *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (same); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 691-92 (7th Cir. 2001) (same).

reproductions [sic] and the loss of his business and financial position," which is simply a threat to destroy JWM. Pet. App. 12. It does not allege that Domino's cared at all about McDonald's own relationship with JWM, or canceled this contract because it wanted to affect the tasks he performed for JWM. *See Pryor v. Sloan Valve Co.*, 487 N.W.2d 846, 849 (Mich. Ct. App. 1992) (allegation that defendants intended to interfere with plaintiffs' relationships with plaintiffs' own corporations is "ludicrous" on its face).

McDonald also suggests that this Court can infer a contract between JWM and McDonald relating to McDonald's rights as a shareholder. Resp. Br. 39. But even if the relationship between a shareholder and a corporation can be characterized as "contractual," McDonald has not mustered any coherent allegation that his rights under that contract were affected here. He does not allege, for example, that Domino's stole his stock certificates or attempted to disrupt his ability to convene a meeting of JWM's board. It is undisputed that McDonald retained his status and rights as a shareholder. Thus even if "discriminators' efforts to prevent blacks from acquiring and benefiting from shareholder status fall within the purview of section 1981," Resp. Br. 44, that is irrelevant here. McDonald's suggestion that Phillips's alleged threats or his own emotional injuries "impair[ed] his status as the black owner of a corporation," *id.* at 39, is either plainly wrong or just another allegation that he lost profits as a shareholder.

B. McDonald Has No Claim for Derivative Injuries from a Violation of JWM's Rights

McDonald's claim also must fail because he offers no persuasive justification for abandoning the traditional presumption against recovery for derivative injuries. The sole direct injury to McDonald alleged in this case is emotional harm from a racial slur. Any such harm cannot support a cause of action under § 1981 because that comment did not violate or interfere with any *contractual*

rights between McDonald and JWM. Pet. Br. 33-35. McDonald's other alleged injuries are entirely derivative of a direct injury to JWM's right "to make and enforce contracts," and thus cannot be recovered.

The common law demanded a "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's act was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.). That principle has taken "many shapes" in the law, 503 U.S. at 268, including the ban on recovery for derivative injuries, proximate cause principles, the privity requirement in contract, and the prudential standing rule barring recovery for injury caused by violation of a third-party's rights.

McDonald's discussion of § 1981 claims in the absence of privity between the plaintiff and defendant consistently fails to appreciate the fundamental distinction between direct and derivative harms. If an outside party persuades an employer to terminate a black employee, that employee has been directly injured. And if the outside party instead "forces the worker off the job by threatening to kill him if he does not quit or ask for a reassignment," Resp. Br. 44, by burning his home, *id.* at 29, or by beating him up, *id.* at 27, the injury is also direct. But McDonald's theory is that "Domino's prevented McDonald from carrying out his duties as JWM's president and operator," *id.* at 44, not because of any direct injury to himself—but instead simply because JWM itself lost the Domino's contract. Unlike in his hypotheticals (and the similar scenarios he draws from the legislative history), that injury is purely derivative of harm to a third party. The same is true of all of McDonald's personal financial injuries, and of his emotional injuries not

directly attributable to the alleged slur. These injuries were not inflicted on McDonald directly or caused by any change in his own employment status; they are the derivative consequences for JWM's owner of JWM's loss of the Domino's contract and eventual bankruptcy. *Supra* at 12 n.7.

Nothing about the text or history of § 1981 suggests an intent to permit recovery for derivative injuries in circumstances like these. The plain language protects only a personal right to "make and enforce contracts"; it does not suggest any intent by Congress to confer a substantive right to be free from the derivative consequences of a violation of *someone else's* right to make and enforce contracts. This Court held in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972), for example, that the Fair Housing Act gives residents of housing facilities "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth v. Seldin*, 422 U.S. 490, 513 (1975). But in *Warth* this Court squarely rejected an argument that § 1981 grants similarly expansive rights—dismissing claims of taxpayers alleging only derivative injuries on the ground that § 1981 did not "expressly or by clear implication grant[] [them] a right of action." *Id.* at 510.

This Court has repeatedly declined to recognize causes of action for derivative injuries even when statutory language seemingly authorizes very broad recovery. Pet. Br. 21, 38. By contrast, the private right of action under § 1981 has been implied by the courts. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). It would be especially inappropriate to infer an intent to abrogate the long-standing presumption against recovery for derivative injuries where Congress has not spoken to the issue at all.[10]

---

[10] *See Holmes*, 503 U.S. at 287-88 (Scalia, J., concurring) (recognizing heightened judicial responsibility to supply reasonable limits on implied rights of action); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723,

The practical concerns that have led this Court to deny causes of action for derivative injuries in the past are also fully present in this case. First, permitting employees to sue for indirect "personal" injuries whenever their employer loses a contract for allegedly discriminatory reasons would saddle the courts with daunting proof problems (such as untangling whether particular injuries are attributable to that lost contract or mismanagement of other projects) and force them "to adopt complicated rules apportioning damages ... to obviate the risk of multiple recoveries." *Holmes*, 503 U.S. at 269. For example, employees (like McDonald) claiming to have lost discretionary "salary" such as merit bonuses would force the courts to determine "the extent to which the affected employ[er] absorbed [its] losses and continued to pay" such bonuses, or instead passed its losses on to its employees. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983); *see also Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (barring indirect purchaser antitrust suits in light of such difficulties). The financial injuries claimed by McDonald overlap with or duplicate injuries suffered by JWM—which is not surprising since JWM's demise was the proximate cause of McDonald's financial difficulties.[11]

---

749 (1975) ("We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question."); *United States v Standard Oil Co.*, 332 U.S. 301, 314-15 (1947) (declining to recognize federal common law action for "tortious interference" for derivative injuries in the absence of clear direction from Congress).

[11] McDonald attempts to resuscitate a claim that Domino's interfered with his relations with his banks. Resp. Br. 2-3. But he has conceded that those banks' contracts were with JWM, and indeed that JWM has *already raised and settled* its tortious interference claims against Domino's based on those contracts. *See* Trustee's Motion and Mem. for Order Approving Stipulation with Domino's Pizza LLC and Affiliates, *In re JWM Invs., Inc.*, No. BK-S-00-19303-LBR, at 5 (Bankr. D. Nev. May 22, 2002) (in support of settlement approved by court, trustee addresses "Debtor's fifth cause of action alleg[ing] that Domino's had intentionally interfered

"[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon ... litigants, or upon the judicial system." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982). And the insolvency of the "victim directly injured" adds further concern because "a suit by an indirectly injured victim could be an attempt to circumvent the relative priority its claim would have in the directly injured victim's liquidation proceedings." *Holmes*, 503 U.S. at 274. As JWM's sole shareholder, McDonald was of course the lowest priority creditor in its bankruptcy.

Second, permitting employees to sue under § 1981 for derivative injuries would authorize massive and complex litigation. Again, if GM cancels its IBM contracts because IBM has too many black employees then every black employee who can allege personal injuries would have a cause of action under McDonald's test, and be entitled to separately litigate the question of GM's intent.[12]

Third, these concerns are entirely avoidable, since in this context "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-70. Courts have consistently allowed § 1981 claims by corporations as the directly injured parties. The corporation's damages for breach are straightforward, unlike derivative employee claims that would require courts to separate out the multiple reasons that, for example, an employee did not receive a higher bonus. The corporation

---

with the Debtor's relationship with Desert Community Bank, Nevada First Bank and other financial institutions," and concludes after investigation that "there simply has been no evidence supporting the claim").

[12] *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Due process prohibits estopping [plaintiffs who have not previously appeared] despite one or more existing adjudications of the identical issue which stand squarely against their position.").

will also be in the best position to evaluate whether the breach truly was discriminatory, as it will have access to the full scope of relevant information about the contractual relationship. And the corporation's much larger damages will give it an incentive to pursue the claims.

Fourth, permitting derivative claims by employees would introduce anomalies that are inconsistent with the language and the plain intent of § 1981. Section 1981 guarantees that "all persons" shall have "the same right" "to make and enforce contracts" as "white citizens." Like other discrimination statutes, § 1981 thus focuses on treatment in the workplace that differs based on race. *See, e.g.*, 42 U.S.C. § 1981(c) (rights protected by § 1981 are guaranteed "against impairment by nongovernmental discrimination"); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 1497, 1504 (2005) ("discrimination" means that "the complainant is being subjected to differential treatment"). But McDonald's theory of derivative recovery would encompass claims in which minority employees are treated *identically* to their white co-workers. If GM cancels its contract with IBM because IBM employs too many minority employees, and IBM is forced to lay off part of its work force, the white employees who lose their jobs have suffered the same injuries to their employment rights as the black employees, for the same reason. GM's breach may violate IBM's right to contract on non-discriminatory terms, but it did not cause IBM to impose discriminatory terms in contracts with its employees. McDonald would grant the black employees—but not the white employees—a right to sue for common injuries arising out of equal treatment by their employer. (McDonald concedes that "his right to nondiscriminatory performance by [JWM]" was not infringed. Resp. Br. 45.)

Finally, the fact that a plaintiff can allege that the derivative injury it suffered was intended by the defendant "is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated Gen. Contractors*, 459 U.S.

at 537. The plaintiff unions in *Associated General Contractors* also alleged a specific intent to injure them, but this Court ruled that even if true that fact was not sufficient to overcome the common law presumption against causes of action for derivative injuries. This Court implied that the employees of the unionized subcontractors that lost work because of the conspiracy also could not sue, even though injury to those employees was certainly the principal object of the conspiracy.[13] As McDonald's arguments in this case demonstrate, any plaintiff alleging that a defendant canceled a contract because it did not wish to do business with its counter-party's minority employees can also allege that the defendant intended to harm those employees. A specific intent requirement is therefore wholly incapable of confining McDonald's expansive interpretation of § 1981 within manageable bounds. Particularly since McDonald concedes that the common law would not have permitted recovery for tortious interference in a situation like this one, Resp. Br. 43, there is no good reason to open that door.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions that it be dismissed.

---

[13] *Associated Gen. Contractors*, 459 U.S. at 541 n.46; *see also, e.g., Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 28 (D.C. Cir. 1987) (employees of airline driven out of business cannot sue for derivative injuries, despite allegation that harm to those employees was intended and "vital to the alleged conspiracy"), *cert. denied*, 485 U.S. 934 (1988), *and cert. denied*, 485 U.S. 961 (1988); *Brian Clewer, Inc. v. Pan Am. World Airways, Inc.*, 674 F. Supp. 782, 784, 787 (C.D. Cal. 1986) (travel agent also cannot sue despite allegation that defendants acted "with the object ... of damaging [his] business"); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir. 1994) (law firm cannot sue for derivative injuries despite "specific intent to cause harm to it").

Respectfully submitted,

ELISA D. GARCIA C.
JOEL F. GRAZIANI
DOMINO'S PIZZA LLC
30 FRANK LLOYD WRIGHT DRIVE
ANN ARBOR, MI 48106-0997
(734) 930-3678

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
ALEXANDER MALTAS
LATHAM & WATKINS LLP
555 11TH STREET, N.W.
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOMINO'S PIZZA, INC., ET AL. *v.* McDONALD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–593. Argued December 6, 2005—Decided February 22, 2006

Respondent McDonald, a black man, is sole shareholder and president of JWM Investments, Inc. (JWM). He sued petitioners (collectively Domino's) under 42 U. S. C. §1981, alleging, *inter alia*, that JWM and Domino's had entered into several contracts, that Domino's had broken those contracts because of racial animus toward McDonald, and that the breach had harmed McDonald personally by causing him to suffer monetary damages and damages for emotional injuries. The District Court granted Domino's motion to dismiss on the ground that McDonald could bring no §1981 claim against Domino's because McDonald was party to no contract with Domino's. Reversing, the Ninth Circuit acknowledged that an injury suffered only by the corporation would not permit a shareholder to bring a §1981 action, but concluded that when there are injuries distinct from those of the corporation, a nonparty like McDonald may nonetheless sue under §1981.

Held: Consistent with this Court's case law, and as required by the statute's plain text, a plaintiff cannot state a §1981 claim unless he has (or would have) rights under the existing (or proposed) contract that he wishes "to make and enforce." The statute, originally enacted as §1 of the Civil Rights Act of 1866, now protects the equal right of "[a]ll persons" to "make and enforce contracts" without respect to race, §1981(a), and defines "make and enforce contracts" to "includ[e] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits . . . of the contractual relationship," §1981(b). This cannot be read to give McDonald a cause of action because he "made and enforced contracts" for JWM as its agent. The right to "make contracts" protected by the 1866 legislation was not the insignificant right to act as an agent for someone else's contract-

Syllabus

ing, but was rather the right, denied in some States to blacks, to give and receive *contractual rights* on one's own behalf. The statute's text makes this common meaning doubly clear by speaking of the right to "make *and enforce*" contracts. When the 1866 Act was drafted, a mere agent, who had no beneficial interest in a contract he made for his principal, could not generally sue on that contract. Any §1981 claim, therefore, must initially identify an impaired "contractual relationship," §1981(b), under which the plaintiff has rights. McDonald's complaint identifies a contractual relationship between Domino's and JWM, but it is fundamental corporation and agency law that a corporation's shareholder and contracting officer has no rights and is exposed to no liability under the corporation's contracts. McDonald's proposed new test for §1981 standing—whereby any person may sue if he is an "actual target" of discrimination and loses some benefit that would otherwise have inured to him had a contract not been impaired—ignores the explicit statutory requirement that the plaintiff be the "perso[n]" whose "right . . . to make and enforce contracts," §1981(a), was "impair[ed]," §1981(c), on account of race. *Shaare Tefila Congregation* v. *Cobb*, 481 U. S. 615, 618; *Runyon*, *supra*, at 168; and *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 669, distinguished. McDonald's policy argument that many discriminatory acts will go unpunished unless his reading of §1981 prevails goes beyond any expression of congressional intent and would produce satellite litigation of immense scope. Pp. 4–10.

107 Fed. Appx. 18, reversed.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except ALITO, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–593

DOMINO'S PIZZA, INC., ET AL., PETITIONERS *v.* JOHN McDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 22, 2006]

JUSTICE SCALIA delivered the opinion of the Court.

We decide whether a plaintiff who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship, may bring suit under Rev. Stat. §1977, 42 U. S. C. §1981.

I

Respondent John McDonald, a black man, is the sole shareholder and president of JWM Investments, Inc. (JWM), a corporation organized under Nevada law. He sued petitioners (collectively Domino's) in the District Court for the District of Nevada, claiming violations of §1981. The allegations of the complaint, which for present purposes we assume to be true, were as follows.

JWM and Domino's entered into several contracts under which JWM was to construct four restaurants in the Las Vegas area, which would be leased to Domino's. After the first restaurant was completed, Domino's agent Debbie Pear refused to execute the estoppel certificates for JWM required by the contracts to facilitate JWM's bank financing. The relationship between the parties further deterio-

rated when Pear persuaded the Las Vegas Valley Water District to change its records to show Domino's, rather than JWM, as the owner of the land JWM had acquired for restaurant construction. McDonald had to go to the Water District to prove JWM's ownership of the land. In the course of what were apparently many and fruitless discussions between McDonald and Pear, McDonald "explained that he intended to see [the contracts] through to completion," even though Pear made clear that unless he agreed to back out of the contractual relationship, he would suffer serious consequences. App. to Pet. for Cert. 12–13. At one point Pear said to McDonald "'I don't like dealing with you people anyway,'" refusing to specify what she meant by "'you people.'" *Id.*, at 13. Pear threatened to use Domino's attorneys to "bury" McDonald if he should sue. *Ibid.* The contracts between Domino's and JWM ultimately remained uncompleted.

At least in part because of the failed contracts, JWM filed for Chapter 11 bankruptcy. The trustee for JWM's bankruptcy estate initiated an adversary proceeding against Domino's for breach of contract. For whatever reason, the trustee chose not to assert a §1981 claim alleging Domino's interference with JWM's right to make and enforce contracts. The breach of contract claim was settled for $45,000, and JWM gave Domino's a complete release. Consequently, no further claims arising out of the same episode could be pursued on JWM's behalf.[1] While the bankruptcy proceedings were still ongoing, McDonald filed the present §1981 claim against Domino's in his personal capacity.

---

[1]Since JWM settled its claims and is not involved in this case, we have no occasion to determine whether, as a corporation, it *could* have brought suit under §1981. We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise §1981 claims. See, *e.g.*, *Hudson Valley Freedom Theater, Inc.* v. *Heimbach*, 671 F. 2d 702, 706 (CA2 1982).

The gravamen of McDonald's complaint was that Domino's had broken its contracts with JWM because of racial animus toward McDonald, and that the breach had harmed McDonald personally by causing him "to suffer monetary damages and damages for pain and suffering, emotional distress, and humiliation." *Id.*, at 16. The complaint demanded that Domino's discharge its "obligations under the contracts which McDonald would have received, but for the discriminatory practices, including, but not limited to front pay, back pay and other lost benefits," as well as "compensatory damages for pecuniary losses, including pain and suffering, emotional distress, mental anguish, and humiliation," and punitive damages. *Id.*, at 17.

Domino's filed a motion to dismiss the complaint for failure to state a claim. It asserted that McDonald could bring no §1981 claim against Domino's because McDonald was party to no contract with Domino's. The District Court granted the motion. It noted that Domino's had "rel[ied] on the basic proposition that a corporation is a separate legal entity from its stockholders and officers," *id.*, at 6, and concluded that a corporation may have "standing to assert a §1981 claim" but that "a president or sole shareholder may not step into the shoes of the corporation and assert that claim personally." *Id.*, at 7 (citing *Guides, Ltd.* v. *Yarmouth Group Prop. Management, Inc.*, 295 F. 3d 1065, 1072–1073 (CA10 2002)).

The Court of Appeals for the Ninth Circuit reversed. It agreed that an "injury suffered only by the corporation" would not permit a shareholder to bring a §1981 action. 107 Fed. Appx. 18 (2004). But relying on its earlier decision in *Gomez* v. *Alexian Bros. Hospital of San Jose*, 698 F. 2d 1019, 1021–1022 (1983), the Ninth Circuit concluded that when there are "injuries distinct from that of the corporation," a nonparty like McDonald may nonetheless bring suit under §1981. 107 Fed. Appx., at 18–19. The

Court of Appeals acknowledged that this approach set it apart from other Circuits. *Ibid.* We granted certiorari. 544 U. S. 998 (2005).

II

Among the many statutes that combat racial discrimination, §1981, originally §1 of the Civil Rights Act of 1866, 14 Stat. 27, has a specific function: It protects the equal right of "[a]ll persons within the jurisdiction of the United States" to "make and enforce contracts" without respect to race. 42 U. S. C. §1981(a). The statute currently defines "make and enforce contracts" to "includ[e] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." §1981(b).

McDonald argues that the statute must be read to give him a cause of action because he "made and enforced contracts" for JWM. On his reading of the text, "[i]f Domino's refused to deal with the salesman for a pepperoni manufacturer because the salesman was black, that would violate the section 1981 right of the salesman to make a contract on behalf of his principal." Brief for Respondent 12. We think not. The right to "make contracts" guaranteed by the statute was not the insignificant right to act as an agent for someone else's contracting—any more than it was the insignificant right to act as amanuensis in writing out the agreement, and thus to "make" the contract in that sense. Rather, it was the right—denied in some States to blacks, as it was denied at common law to children—to give and receive *contractual rights* on one's own behalf. Common usage alone is enough to establish this, but the text of the statute makes this common meaning doubly clear by speaking of the right to "make *and enforce*" contracts. When the Civil Rights Act of 1866 was drafted, it was well known that "[i]n general a mere agent, who has no beneficial interest in a contract which he has made on

behalf of his principal, cannot support an action thereon." 1 S. Livermore, A Treatise on the Law of Principal and Agent 215 (1818).[2]

Any claim brought under §1981, therefore, must initially identify an impaired "contractual relationship," §1981(b), under which the plaintiff has rights.[3] Such a contractual relationship need not already exist, because §1981 protects the would-be contractor along with those who already have made contracts. We made this clear in *Runyon* v. *McCrary*, 427 U. S. 160 (1976), which subjected defendants to liability under §1981 when, for racially-motivated reasons, they prevented individuals who "*sought to enter* into contractual relationships" from doing so, *id.*, at 172 (emphasis added). We have never retreated from what should be obvious from reading the text of the statute: Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual rela-

---

[2]McDonald's "pepperoni salesman" analogy is imprecise. It would better parallel the facts here if the analogy had been to a salesman unable to collect on accounts receivable because he was black, rather than to one who was unable to make the contract in the first place. The fundamental point, however, is the same: An individual seeking to make *or* enforce a contract under which he has rights will have a claim under 42 U. S. C. §1981, while one seeking to make *or* enforce a contract under which someone else has rights will not.

[3]We say "under which the plaintiff has rights" rather than "to which the plaintiff is a party" because we do not mean to exclude the possibility that a third-party intended beneficiary of a contract may have rights under §1981. See, *e.g.*, 2 Restatement (Second) of Contracts §304, p. 448 (1979) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty"). Neither do we mean to affirm that possibility. See, *e.g.*, *Blessing* v. *Freestone*, 520 U. S. 329, 349 (1997) (SCALIA, J., concurring) ("Until relatively recent times, the third-party beneficiary was generally regarded as a stranger to the contract, and could not sue upon it"). The issue is not before us here, McDonald having made no such claim.

tionship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.

Absent the requirement that the plaintiff himself must have rights under the contractual relationship, §1981 would become a strange remedial provision designed to fight racial animus in all of its noxious forms, but only if the animus and the hurt it produced were somehow connected to *somebody's* contract. We have never read the statute in this unbounded—or rather, *peculiarly* bounded—way. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 176 (1989); *Burnett* v. *Grattan*, 468 U. S. 42, 44, n. 2 (1984); *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 396 (1982).

Nor has Congress indicated that we should. We held in *Patterson* that the prior version of §1981 did "not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." 491 U. S., at 171. In 1991, Congress amended the statute, see 105 Stat. 1071, adding §1981(b), which defines "make and enforce" to bring postformation conduct, including discriminatory termination, within the scope of §1981. See *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369, 383 (2004). But while Congress revised *Patterson*'s exclusion of postformation conduct, it let stand *Patterson*'s focus upon contract obligations. In fact, it positively reinforced that element by including in the new §1981(b) reference to a "*contractual relationship*."

McDonald's complaint does identify a contractual relationship, the one between Domino's and JWM. But it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts. McDonald now makes light of the law of corporations and of agency—arguing, for instance, that because he "negotiated, signed, performed,

and sought to enforce the contract," Domino's was wrong to "insist that [the contract] somehow was not his 'own.'" Brief for Respondent 4. This novel approach to the law contradicts McDonald's own experience. Domino's filed a proof of claim against JWM during its corporate bankruptcy; it did *not* proceed against McDonald personally. The corporate form and the rules of agency protected his personal assets, even though he "negotiated, signed, performed, and sought to enforce" contracts for JWM. The corporate form and the rules of agency similarly deny him rights under those contracts.

As an alternative to ignoring corporation and agency law, McDonald proposes a new test for §1981 standing: Any person who is an "actual target" of discrimination, and who loses some benefit that would otherwise have inured to him had a contract not been impaired, may bring a suit. Under this theory, an individual is the "actual target" if he was the *reason* a defendant chose to impair its contractual relationship with a third party. McDonald's formulation simply ignores the explicit statutory requirement that the plaintiff be the "perso[n]" whose "right . . . to make and enforce contracts," §1981(a), was "impair[ed]," §1981(c), on account of race. It is just the statutory construction we have always rejected.

McDonald points to several of our prior cases involving plaintiffs whose status as contracting parties was unclear. Because they nonetheless prevailed, McDonald reasons, contractual privity cannot be a *sine qua non* of a §1981 claim. In those cases, however, we did not discuss, much less decide, the privity question. In *Shaare Tefila Congregation* v. *Cobb*, 481 U. S. 615 (1987), we decided the narrow question whether Jews are a separate and protected race under §1982. *Id.*, at 618. Similarly, in *Runyon*, *supra*, the arguments and the opinion addressed "only two basic questions: whether §1981 prohibits private, commercially operated, nonsectarian schools from denying admission to pro-

spective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied." *Id.*, at 168 (footnote omitted). And in *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987), we decided only the two contested issues: that §1981 was subject to the state personal injury limitations period, *id.*, at 660–664, and that it violates Title VII of the Civil Rights Act of 1964 and §1981 for a union to decline to press black employees' grievances under the governing collective-bargaining agreement, *id.*, at 669. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 272 (1990) (citations omitted).

McDonald resorts finally to policy arguments. Unless his reading of the statute prevails, he warns, many discriminatory acts will go unpunished. Corporations, for instance, may choose not to bring suit for the racially motivated contract breach. It is not likely to be a common occurrence that the victim of a contract breach will forgo a potent available remedy. Injured parties "usually will be the best proponents of their own rights," *Singleton* v. *Wulff*, 428 U. S. 106, 114 (1976). And if and when "the holders of those rights . . . do not wish to assert them," *id.*, at 113–114, third parties are not normally entitled to step into their shoes. Moreover, §1981 is only one of a multitude of civil rights statutes. Many of McDonald's hypothetical examples of unpunished discrimination would in fact be reachable under Title VII—or even under general criminal law. See, *e.g.*, Brief for Respondent 27 (concerning a scenario in which "Domino's officials had beaten up McDonald in an attempt to intimidate him"). The most important response, however, is that nothing in the text of §1981 suggests that it was meant to provide an omnibus remedy for *all* racial injustice. If so, it would not have

been limited to situations involving contracts. Trying to make it a cure-all not only goes beyond any expression of congressional intent but would produce satellite §1981 litigation of immense scope. McDonald's theory would permit class actions by all the minority employees of the nonbreaching party to a broken contract (or, for that matter, minority employees of any company failing to receive a contract award), alleging that the reason for the breach (or for the refusal to contract) was racial animus against them.

Consistent with our prior case law, and as required by the plain text of the statute, we hold that a plaintiff cannot state a claim under §1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes "to make and enforce." Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else's. Because the District Court correctly recognized and applied these principles, the Ninth Circuit erred in reversing its judgment.[4]

* * *

The judgment of the Ninth Circuit is accordingly

---

[4]McDonald also argues in his merits brief (for the first time) that we should affirm the Ninth Circuit's judgment because Domino's interfered with McDonald's own contracts with JWM. Counsel for McDonald asserted at oral argument that this contention is not a new argument (see this Court's Rule 15.2), but is a "sort of formulatio[n] of the same argument" that he had properly raised. Tr. of Oral Arg. 28. As such, it fails for the same reasons that the argument fails in its original incarnation. McDonald acknowledges that JWM did not breach any contractual obligation to him, see Brief for Respondent 44, and so any injury he may have received still derived from impairment of the contractual relationship between JWM and Domino's, under which McDonald has no rights.

Reversed.

JUSTICE ALITO took no part in the consideration or decision of this case.